Supreme Court, U.S.
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In the

Supreme Court of the United States

WILBERT SKIPPER, JR.; MELVYN CONNOR; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR. and DAVID JONES;

Petitioners,

v.

GIANT FOOD INCORPORATED; PETER MANOS, in his official capacity; SAMUEL THURSTON, in his official capacity; MARIA MYERS, in her official capacity; ROBERT HAYWOOD, in his official capacity; DEBORAH LILLY, in her official capacity; TOM MAYNARD, in his official capacity and CHRIS BALLADEMAS, in his official capacity,

Respondents.

Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under Rule 23, a district court in a civil rights action can decide the merits of an employee's individual claims prior to ruling on the employee's motion for class certification?

2. Whether under Rule 23 individual plaintiffs in a civil rights action having the same claims as the putative class but varied factual allegations in- severity and specificity have standing to bring hostile work environment and desperate treatment claims for class certification?

3. Whether under Rule 23 a district Court is required to hold an evidentiary hearing on a motion for class certification, when requested by a party and the parties have disputed every aspect and proposed fact presented in reference to the motion?

4. Whether under Rule 37 a district court making a monetary award to plaintiffs of $25,000 in discovery sanctions against defendants, condition plaintiffs receiving the award on plaintiffs' counsel divulging confidential client information to defendant employer?

5. Whether a timely notice of appeal from the district court to a court of appeals, which is subsequently amended with additional issues, must be reviewed and decided by that court?

CORPORATE DISCLOSURE STATEMENT

Petitioners Wilbert Skipper, Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls, Jr., John W. Dallas, Jr. and David Jones, individually are not: (1) a publicly held corporation, (2) publicly held entity, (3) own any parent corporation, (4) own 10 percent or more stock in a publicly held corporation or other publicly held entity, (5) that there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation and (6) the petitioners are not a trade corporation.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Wilbert Skipper, Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls, Jr., John W. Dallas, Jr. and David Jones, individually and on behalf of those similarly situated were appellants below.

The respondents in this Court, appellees, below, are Giant Food, Incorporated, Peter Manos, in his official capacity, Samuel Thurston, in his official capacity, Maria Myers, in her official capacity, Deborah Lilly, in her official capacity, Tom Maynard, in his official capacity and Chris Ballademas, in his official Capacity.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals' caption nor are appellants here, are: Gregory Carson, Jerry Mungro and the United Food & Commercial Workers Union, Local 400, who appeared as a Party in Interest.

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OPINIONS BELOW

Petitioners seek to appeal a judgment denying class certification for African American warehouse workers who allege they and putative class members were subjected to a racially hostile work environment and disparate treatment for over 33 years and dismissing their individual claims. The district court's February 20, 2002 order denying class certification and entering judgment (Pet. App. 14a-53a) is unpublished.[1] The district court's eight (8) February 20, 2002 orders dismissing each of the 9 individual petitioners claims and entering judgment (Pet App. 54a-136a) are unpublished.[2] The district court's February 20, 2002 order denying full sanctions against respondents for discovery violations. (Pet. App. 195-200) The district court's scheduling order (s) (Pet. App. 201a-212a) denying petitioners' an evidentiary hearing and ruling on the respondent employers' eight (8) motions for summary judgment prior to ruling on petitioners' motion for class certification. The Fourth Circuit's June 11, 2003[3] Opinion (per Wilkins, joined by Wilkinson and Luttig concurring in the judgment) (*id.* Pet. App. 1a-13a) holding that: (1) it was not clear from the record that the district court had decided the merits of plaintiffs' cases before ruling on class certification; (2) that due to the

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[1] At the time the February 20, 2002 district court decision was decided, the following Supreme Court cases had not been decided. *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002) and *Desert Palace, Inc v. Costa*, 123 S. Ct. 2148 (2003)

[2] The district court entered one order as to petitioners John Dallas and David Jones. The district court dismissed their individual claims on February 20, 2002. (Pet App. 125a-135a).

[3] At the time the parties made their May 9, 2003 oral argument before the Fourth Circuit Court of Appeals, the Supreme Court case of *Desert Palace, Inc v. Costa*, 123 S. Ct. 2148 (2003) had not been decided. The Fourth Circuit ruled in this matter 2 days after this court released its opinion in *Desert Palace*.

individualized nature of plaintiffs' claims denied them standing to pursue class certification for putative class members on hostile work environment and disparate treatment claims; (3) that although plaintiffs' sought injunctive relief their request for damages in the amount of $139, 400.00 0 deemed their case to be of a monetary nature and thus not appropriate for class treatment; that plaintiffs could not "press" a class action or individual claim of a racially hostile environment unless they "substantiate their claims with reasonable specifics about the alleged incidents that underlie their claim [4], (5) petitioners and counsel did not meet the adequacy requirement and (5) the refusal of the court to review petitioners timely notice of appeal of two issues: (a) one concerning the district court's denial of petitioners' request to correct the docket sheet and (b) their second issue concerning the denial of petitioners request for full sanctions and district court's imposition of the conditions that in order for petitioners in order for petitioners to receive the monetary award of sanctions from respondents is unpublished.

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[1] In 1997 the respondents were permitted by the United States District Court of Maryland to take and interlocutory appeal pursuant to 28 U.S.C. § 1292. (Pet. App. 136a-149a). The district court certified a question of law to the United States Court of Appeals For The Fourth Circuit. The question certified was whether or not the arbitrator should decide which of plaintiffs' claims was arbitrable and whether plaintiffs' collective bargaining agreements (CBAs) required plaintiffs' to arbitrate their discrimination claims. The case was argued on March 5, 1999. It was decided April 29, 1999. The district court's decisions refusing to allow the arbitrator to decide which claims were arbitrable and that the CBAs between the unions and Giant did not require arbitration of their discrimination claims was affirmed. The Fourth Circuit opinion (per Wilkinson, joined by Wilkins and Luttig concurring in the judgment) is published.

JURISDICTION

The Fourth Circuit entered its opinion on June 11, 2003. Appellants filed a petition for rehearing and petition for rehearing en banc on June 25, 2003. The petition for rehearing and petition for rehearing en banc was denied on July 8, 2003. (Pet App. 151a-152a) This petition for writ of certiorari was filed on October 6, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUES INVOLVED

Fed. R. Civ. 23, Title VII of the Civil Rights Act of 1964, 42 U.S.C. and Fed. R. Civ. P. 37 (Pet. App.220a-230a). 28 U.S.C. §1291 provides in relevant part: The courts of appeals***shall have jurisdiction of appeals from all final decisions of the district courts of the United States***."

STATEMENT OF CASE

A. BACKGROUND

On September 12, 1996, petitioners Wilbert Skipper, Maurice Mathews, Anthony Blocker, David Newman, John Dallas, Jr., David Jones, W. Kirb Qualls, Jr., William Ingram and Melvyn Connor, (collectively "petitioners"), African Americans brought a class action and individual claims against Giant Food, Inc. ("Giant") and individual defendants Pete Manos, Deborah Lilly, Samuel Thurston, Robert Haywood, Maria Myers, Tom Maynard and Nick Balodemas (collectively "respondents") for condoning and perpetrating a racially hostile work environment and discrimination in the workplace. Petitioners sued defendants in the district court of Maryland pursuant to Title VII of the Civil

Rights Act of 1964, as amended, Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1985, and 1986; state common law claims, the Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act of 1967 ("ADEA") and Maryland Human Rights Act.

On November 16, 1996 respondents filed motions to dismiss and/or in the alternative motions for summary judgment. In the in the interim, petitioners moved the district court in approximately December 1996 to adopt their proposed order and discovery plan. (Pet. App. 202a-207a.) Petitioners moved the district court to enter a plan that allowed the court to first rule on petitioners' motion for class certification and to hold an evidentiary hearing. (Pet. App. 202a). However, the district court after granting in part and denying in part respondents' motion to dismiss or in the alternative motion for summary judgment entered order-ordering petitioners to file their motion for class certification simultaneously with respondents filing their second motion for summary judgment. [5](Pet. App. 187a-189a). The district court also upon respondents' motion, certified a question of law to the Fourth Circuit Court of appeal. The district court refused to stay discovery while the respondents appealed to the court of appeals. However, respondents moved the Fourth Circuit to stay discovery, which that court granted for almost 2 years.

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[5] However, the district court judge that managed and oversaw petitioners case also oversaw other class actions in the Maryland United States district court. In those non-civil rights class actions the district court of Maryland did require those plaintiffs seeking class certification to file their motion for class certification simultaneously with the defendants' motions for summary judgment. (Pet. App. 213-218a and 219a-220a). The Maryland district court only in civil rights class actions decided the merits of petitioners' claims prior to ruling on their motion for class certification. (Pet. App 179a-190a). (See Muhammad et. al. v. Giant Food Inc. et. al. JFM-98-3565)

On April 29, 1999 in a published opinion, the Fourth Circuit affirmed the district court's August 1997 decision, that the petitioner's collective bargaining agreements (CBAs) did not require petitioners to arbitrate their discrimination claims. (Pet. App. 136a-149a).

After the court of appeals April 29, 1999 decision, from May 1999 until August 2000 the petitioners engaged in discovery. (Pet. App. 212a). During that period the district court entered into a number of scheduling orders, however the district court's last scheduling order ordered that respondents submit to the court their motions for summary judgment first and petitioners submit their motion for class certification afterwards. (Pet. App. 211a-212a) Additionally, petitioners as a whole had problems with both the district court and respondents while they made attempts to engage in discovery Petitioners' motion to compel the deposition of Giant's Corporate designee was denied, their motion to compel documents was denied and they were subjected to receiving bogus information from Giant on its employment computer tapes. As a result of Giant's discovery violations petitioners moved for sanctions. On February 20, 2002 the district court awarded the petitioners a monetary award of $25,000 in sanctions against respondents. (Pet App. 192a-194a). However, when petitioners sought a reconsideration of the district courts award because the award fell short of all expenses petitioners incurred as a result of respondents violation of Rue 37, the district court then entered an order conditioning the petitions receipt of the $25,000 upon their counsel divulging confidential client financial information to respondents. The district court also imposed a condition that if petitioners' counsel failed to divulge the exact amount of money that each plaintiff gave and contributed in both class actions against Giant

then petitioners would not receive the $25,000 in sanctions. (Pet. App. 195a-197a).[6]

From the outset of the action, respondents sought Class Certification pursuant to Rule 23 and an evidentiary class certification hearing pursuant to Rule 23(c). On July 7, 2000, Appellants filed a formal Motion for Class Certification, 2 statistical reports, filing excerpts from 25 depositions, 75 affidavits and 100 other exhibits supporting their class' allegations of a pattern and practice of discrimination against African Americans ("Blacks") at Giant, as well as their compliance with Rule 23(a) requirements for class certification. Despite this substantial record, the District Court denied petitioners' Motion For Class Certification and to hold an evidentiary hearing.

What is clear in the record is that the district court decided the merits of petitioners' claims prior to deciding their motion for class certification, thus summarily disenfranchising thousands of putative class members. The Court had an obligation at all times to protect the class claims and to follow the Congressional intent of Rule 23, namely to identify and protect those public claims which are too small to be brought on their own and to rule and determine as soon as practical whether or a not a class should be certified. The district court and court of appeals failed on all fronts in keeping with the intent of Rule 23.

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[6] The district court in its February 24, 2002 order, ordered that petitioners counsel had to divulge to Giant the amount of money each plaintiff gave in both the Carson and Muhammad class actions. At the time the district court made its ruling the district court had already dismissed the Muhammad plaintiffs' claims and their case was pending in the court of appeals in the Fourth Circuit. (Pet. App. 195a-197a).

B. REASONS FOR GRANTING THE WRIT

This case presents five (5) questions: (1) Whether under Rule 23, a district court in a civil rights action can decide the merits of an employee's individual claims prior to ruling on the employer's motion for class certification?; (2) Whether under Rule 23 individual plaintiffs in a civil rights action having the same claims as the putative class but varied factual allegations in severity and specificity, have standing to bring hostile work environment and desperate treatment claims for class certification?; (3) Whether under Rule 23 a district Court is required to hold an evidentiary hearing on a motion for class certification, when requested by a party and the parties have disputed every aspect and proposed fact presented in reference to the motion?; (4) Whether under Rule 37 a district court making a monetary award to plaintiffs of $25,000 in discovery sanctions against defendants can condition plaintiffs receiving the award on plaintiffs' counsel divulging confidential client information to defendants? And whether after a timely notice of appeal is filed in the court of appeals the court must review all issues raised.

It is clear that petitioners are individuals who sought to have four (4) subclasses and not two (2) certified on behalf of African American union warehouse employees from at least 1980 until 1996. There is no doubt that the district court set in scheduling orders from 1997 until 2001 which required the petitioners to submit their motion for class certification simultaneously with the defendants eight (8) motions for summary judgments (Pet App. 187a-189a, 208a-213a) and ultimately after defendants filed their motions for summary judgment. Plaintiffs objected to the district court's scheduling orders by formal motion, letter motion, motion for appropriate relief and

in oral argument throughout the 6 years in which the action was litigated. On at least 2 occasions Plaintiffs Counsel submitted proposed orders to the court to be entered which were consistent with the United States district court of Maryland's practice (Pet. App.214a-221a) as well as other courts' class action practices. However, the Maryland district court denied petitioners requests to modify and/ or revise its scheduling orders so as not to decide the merits of their claims prior to deciding their motion for class certification. (Pet. App. 201a-206a) instead, the district court set scheduling orders in place in this case and in its companion case, *Muhammad et. al. v. Giant Food Inc. et. al.* JFM 98-3565, which has been pending before the Fourth Circuit since August of 2001 that would automatically negate class certification.[7] Pet App. (179a-186a, 190a-192a) The district court's scheduling orders in both discrimination class actions cases mandated that the merits of defendant employers' motions for summary judgment would be decided first. In other words the district court was deciding the merits of plaintiffs claims first and their motion for class certification later, if at all. (Pet. App. 179a-186a, 1187a-189a-190a-194a, 208a-213a). On this point, the Fourth Circuit opined that it could not tell if the district court had ruled on respondents 8 motions for summary judgments and decided the merits of petitioners claims prior to ruling on the motion for class certification. (Pet. App. 13a) However, it is crystal clear that the district did exactly that.

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[7] *Muhammad et. al. v. Giant Food Inc et. al.* Record N0S 01-1031(L), 01-1032, 01-1033, 01-1034, 01-1035 and 01-1036. The *Muhammad* appeal was filed in the United States Court of Appeals For the Fourth Circuit September 7, 2001. Issues 1, 2 and 3 presented before this court are currently pending in the *Muhammad* appeal in the United States Court of Appeals For The Fourth Circuit. (Pet. App.179a-180a)

The court of appeal's and district court's decisions is wrong as a matter of law and logic. In fact petitioners companion case, *Muhammad* was also managed and decided by the same district court judge who oversaw and managed petitioners proposed class action. The *Muhammad* proposed class action was a second race discrimination class action brought against the same respondents and they met the same fate as this matter. (Pet. App. 179a-186a) That case started out with originally seven (7) plaintiffs and then six (6). The same district court judge at the conclusion of the *Muhammad* case of four years, on November 27, 2000 severed the six plaintiffs from the *Muhammad* case. The district court ordered the clerk to open up separate cases for each plaintiff after having decided the merits of *Muhammad* plaintiffs' claims. (Pet. App. 180a). After dismissing all of the six *Muhammad* claims and entering judgment against each one, the district court ruled that their motion for class certification was then moot. (Pet. App. 179a-186a).

Fed. R. Civ. P. 23 regulates class actions, providing at subsection c(1) that "(A)s soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be do maintained." The Fourth Circuit Panel hearing petitioners case agreed on this point with petitioners. (Pet. App. 13a). The Fourth Circuit has itself noted that "[t]he language of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the merits'" *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n9 (4th Cir. 1976) (citations omitted), vacated on other grounds, 431 U.S. 952 (1977) (citation omitted). Other courts recognize that the 'language of the Rule calls for the earliest possible determination" of class certification. *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 274

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(10th Cir. 1977). The Congressional intent behind Rule 23 itself supports interpreting that issue in favor of the petitioners; the comment to Rule 23(c) states that the court should determine, "as early in the proceedings as may be practicable," the class certification issue. F.R.C.P. 23, comment (West 2003). The purpose of this mandate is [I]n order to give clear definition to the action." *Id* By the district court delaying such clear definition of the action for more than five (5) years, and eventually declining to give such definition altogether with a summary judgment doge at the end of that time, the district court worked a clear prejudice upon the petitioners, who spent tens of thousands of dollars and voluminous hours in anticipation of presenting their class evidence, having no indication from the court that the entire class substance would be completely ignored.

In particular, both courts disregarded the Fourth Circuit's holding in *Nance v. Union Carbide Corp., Consumer Products Division*, 540 F.2d 718, 723 n.9 (4th Cir. 1976), *vacated on other grounds*, 431 U.S. 952 (1977), that "[t]he language of Rule 23(c) makes quite clear that the determination of class status is to be made 'before the decision on the merits.' *See Peritz v. Liberty Loan Corporation*, (7th Cir. 1975) 523 F.2d 349, 354[.]" The Fourth Circuit has not retreated from this ruling. Recent cases have similarly espoused the view that the better policy is to determine class certification questions before delving into the merits of the representative plaintiffs' claims and that an earlier determination of the merits of the claims is not favored by Rule 23. *Chavez v. Illinois State Police*, 251 F.3d 612, 630 (7th Cir. 2001). One court has noted "serious questions" concerning the consideration of summary judgment motions before deciding whether a class action should be certified and "urge[d] district courts to exercise caution before deciding to embrace" that procedure. *Waste*

Management Holding, Inc. v. Mowbray, 208 F.3d 288, 299 n.7 (1st Cir. 2000); *see also Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975) (1966 amendments to Rule 23 were intended to assure that members of the class be identified before trial and to require class certification prior to a determination on the merits).

In *Nelson v. Murphy*, 44 F.3d 497, 500 (7th Cir. 1995), the court criticized a district court's delay in deciding whether an action should be certified as a class action, writing as follows:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed. R. Civ. P. 23(c)(1). This case was active on the district courts docket for three years and four months, but despite two motions for class certification and full briefing by the parties the court never decided whether it could be maintained as a class action. The court did not give a reason for this inaction, and we do not perceive one. Prompt decision one way or the other is imperative not only so that the parties know whose interests are at issue but also so that representative plaintiffs with live claims may be substituted.

These comments are equally applicable here. Respondents should have known whose interests were at issue early on in their case. A prompt decision on that question is required and should be given before any consideration of the merits is entertained.

Perhaps even more fundamental, the instant action should not have been treated differently from other actions before the Maryland district court in which class action status was sought. The standard practice of the Maryland district court in other cases in which class certification has been sought has been to first determine the certification issue and only thereafter entertain and decide motions going to the merits of the underlying claims. For example, in *In re American Honda Motor Co. Dealer Relations Litigation*, 979 F. Supp. 365 (D. Md. 1997), an action in which racketeering claims were brought by automobile dealers, the Maryland district court first determined the plaintiffs' Rule 23 motion before proceeding to determine the merits. (Pet App. 214a-219a). Indeed, the district court specifically held that it would certify the class action as to particular claims of the plaintiffs pending motions to dismiss those claims. *Id.* at 366. Similarly, in *Scardaletti v. Santoro*, No. JFM-97-3464 (D. Md. Sept. 14, 1999), the Maryland district court certified as a class action a case involving pension beneficiaries who stood to have reduced benefits and did not first determine the merits of the plaintiffs claims. (Pet. App. 220a-221a)

To break from this precedent and decide the merits of the named petitioners' claims denied them due process and raised an appearance of impropriety. (Pet App. 214a-221a) This is especially so since this Court in another case involving African-American workers seeking relief for employment discrimination chose to dismiss class certification issues by deciding the individual merits of the case. *Muhammad v. Giant Food, Inc.*, No. JFM-98-3565, slip op. at 3 n.3 (D. Md. Nov. 27, 2000). This was the same approach adopted in another case involving claims of employment discrimination involving African-American longshoremen, in which this same district court chose to

determine the merits of the individual claims before ruling on a Rule 23 motion. *See Player v. Maher Terminals, Inc.*, Nos. 87-3535, 87-3575 (4th Cir. Jan. 19, 1988).

Despite the general rule that class certification be considered before any determination of the merits, there appears to be a pattern of determining the merits of claims involving race discrimination before class certification is determined. Since the instant case was similarly treated, this appearance might be perpetuated and the inference of impropriety the public might draw enhanced. The instant petitioners did not request and do not request any special treatment or consideration. They only request that their case be given the same treatment that has been given to other class actions, which do not involve civil rights or discrimination in employment.

The same point is reflected in the scheduling order issued in this case. (Pet. App. 193a-194a-208a-213a). The district court required petitioners not only to file their responses to the Defendants' summary judgment motions within 90 days but also required that the class certification motion be filed within that same time frame. In other class action cases such as *American Honda* and *Scardaletti* the district court did not order a similar compression of the class certification and summary judgment issues. (Pet. App. 214a-221a) The plaintiffs in those cases were allowed to address in turn the questions of class certification and the merits.

In order to afford equal treatment to civil rights litigants seeking class treatment, this Court should address the issues now being put before it so as to preclude other litigants from having to endure the same injustices, to maintain uniformity in the application of

the law and to ensure that all litigants regardless of who they are afforded fair treatment by our courts. By reviewing this case, this court can again set a necessary standard for the lower courts to follow and to increase their and all litigants' understanding of the intent and application of Rule 23 in civil rights cases. Uniformity must be established under Rule 23 when it comes to civil rights cases because these cases ultimately protect the human rights of many who cannot do it for themselves.

Petitioners also had their class claims dismissed because allegedly their individual claims varied factually. While Rule 23(a) also requires that the claims raised by the named Plaintiffs be "typical" of those of the members of the proposed class, that requirement is satisfied for much the same reasons listed above relating to commonality. "Because the elements of commonality and typicality tend to merge, *Falcon*, 457 U.S. at 157 n.13, where Plaintiffs establish commonality by proving class-wide harm caused by a subjective, centrally administered personnel system, typicality is satisfied by the same showing. *Id.* at 159 n.15. As with the requirement of commonality, the facts and claims of each class member do not have to be identical to support a finding of typicality." *Thomas*, 169 F.R.D. at 238; *accord McKnight*, 1996 WL 454994, at **5-6. Therefore, the typicality requirement also is satisfied in this case.

The fact that each and every petitioner and proposed class member did not receive the identical and exact same disparate treatment under precisely the same circumstances does not negate the petitioners claims that they have met the requirements under Rule 23 as to commonality and typicality. The experience of the proposed class members need not be the identical; it

is sufficient that there are some common questions of law or fact, i.e. were the class members discriminated against because of their race?. *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

As to the hostile work environment class claim the petitioners' experiences were not unique and individualized. In the alternative if they were it was not fatal to their claim that they met the requirement under Rule 23. Such claims concern the entire environment and general work atmosphere, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001), and the fact that one worker can point to racial hostility is highly persuasive in showing that another worker of the same race suffered from the same hostility. The district court and Fourth Circuit found that racial hostility or evaded the warehouse facilities for a period of at least 1980 - 1996., and if that is so there is no reason for concluding that Black workers within the class did not commonly suffer from such hostility. More importantly the district court failed to review or consider incidents beyond 3 years and the court of appeals looked at only 6 years, although under *National Railroad Passenger Corp v. Morgan*, 122 S. Ct.2061 (2002), this court has held that the courts are required to review and consider all circumstances. But the court of appeals and district court's opinions that petitioners individual experiences were factually different than the class and thus they have no standing in which to pursue a hostile environment class and disparate treatment class is not what other courts have held. It is also not what the Fourth Circuit has held.

In *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-33 (4th Cir. 1983), the Fourth Circuit affirmed an order certifying as a class black employees and former employees of the defendants' grocery stores and

warehouses, which included at least 15 different facilities. *Id.* at 330 n.2. The court wrote that "[a] s to the commonality requirement, the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged black employees." *Id.* at 333. The court similarly found that the class was properly certified as to discrimination in promotions because of the "absence of written, objective criteria for promotions and terminations, the virtual absence of regular job performance evaluations, and the presence of an overwhelmingly white supervisory force." *Id.* at 333-34. In *McKnight v. Circuit City Stores*, 1996 WL 454994 (E.D. Va. 1996),[8] the court specifically relied upon *Lilly* in determining to certify a class action alleging employment discrimination. The plaintiffs alleged, as in this case, that subjective criteria controlled employment decisions and resulted in both disparate impact and disparate treatment of black employees. The court certified the class and rejected the idea that *Stastny* required that certification be denied, pointing out that "unlike the plaintiffs in *Stastny*, plaintiffs here allege an element of influence and control in the form of implicit directions by senior managers concerning how individual managers should exercise their discretion, another link among their claims of promotion and transfer denial." *Id.* at *5.

There is widespread recognition that commonality is satisfied in cases alleging that subjective criteria and the

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[8] The court in *McKnight* eventually decertified the class, but not because of any issues of commonality or typicality; it found a class action would not be the most fair and efficient way to handle the case in light of the plaintiffs' proposed trial schedule. *McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 553 (E.D. Va. 1996), *aff'd sub nom. Lowery v. Circuit City Stores*, 158 F.3d 742 (4th Cir. 1998), *vacated and remanded*, 527 U.S. 1031 (1999).

lack of definite standards resulted in disparate impact and disparate treatment discrimination. In *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999), the court reversed a district court's ruling denying certification of a class action in a case alleging company-wide discrimination against African-American employees. As in this case, the employer challenged the showing of commonality by asserting that there were significant differences between departments of the employer and Similarly, in *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993), the court rejected an employer's argument that a class action should not have been certified because the class embodied different facilities where different supervisors were responsible for employment decisions.

What is also clear is that the district court and the Fourth Circuit have set exceedingly high, restrictive, narrow and harsh standards for civil rights petitioners who want to bring race discrimination class actions and individual claims. Neither court has held such extreme and harsh standards for litigants who have brought consumer class actions. In fact the record below shows that the district court judge in this matter has lowered and lessened the standards for non-discrimination cases, including cases involving fraud. The burden for non-discrimination litigants before the Maryland district court has routinely been held to a low threshold and burden of proof. But civil rights litigants have been held to a higher, harsher and strict standard of proof, which is totally out of reach for race discrimination litigants.

Lastly both courts denied class certification allegedly on the basis that Plaintiffs requested monetary relief in connection with the equitable and declaratory relief demanded. However, the existence of a request for monetary relief does not bar certification under Rule

23(b)(2). *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), cert denied, 404 U.S. 1006 (1971). The monetary relief being sought is not high considering the thousands of putative class members. The extent of the damages sought is primarily a function of the numerous persons within the putative class, and to an extent the serious harm suffered by the class members. The primary focus of this action is and has always been to stop Giant from continuing in unfair, discriminatory and hostile employment practices in order that Black workers may share fully and equally in the benefits and opportunities of employment with this major corporation.

The district and circuit courts holding against Rule 23 certification because petitioners had varied factual differences is wrong when it comes to a hostile work environment and disparate treatment claims. The environment at the few facilities involved in this action and the experiences of Black employees at those facilities are remarkably similar if not identical. That they did not all suffer from the same factual indignity in this action at the same time and under the same circumstance does not mean that Rule 23(c) is applicable. What "predominates", the key concern under that rule , is that the environment at Giant's warehouse facilities was hostile to Black employees and that Black employees were typically treated unfairly due to racially hostile managers overseeing an unduly subjective disciplinary and hiring system. Those concerns are key overriding overriding issues in this action and would be common to all members of the classes and make certification of the classes the most effective and efficient way to dispose of all the class claims.

Rule 23 motion creates the need for a hearing. For example, respondents challenged the commonality

element for a class action in this case and requested that there be "rigorous analysis" of this issue. But it has been held that "*Falcon* requires the trial court to engage in extensive factual analysis at the certification stage in order to satisfy itself that the requirements of Rule 23 have been met." *Haywood v. Barnes*, 109 F.R.D. 568, 575 (E.D.N.C. 1986). The respondents made a great issue out of counsel for Plaintiffs' ability to adequately represent the proposed classes. Adequacy of counsel is a factual issue upon which the court must make a sufficient inquiry. *McGlothlin v. Connors*, 142 F.R.D. 626, 633 (W.D. Va. 1992). And whether injunctive or monetary relief predominates, which bears upon the inquiry under Rule 23(b), also is a factual question, which should be determined only after a hearing. *Hoffman*, 191 F.R.D. at 534-36 (the court can determine whether damages are the predominant relief sought by the plaintiff class only after a hearing upon the matter). Therefore, there are significant issues, which should be the subject of a suitable hearing in order that all facets of those issues are adequately developed and explored.

The Fourth Circuit recognizes that although "suits involving racial discrimination lend themselves generally to class treatment," Title VII Appellants must still satisfy the prerequisites of Rule 23(a). *Doctor v. Seaboard Cost Line R. R. Co.*, 540 F.2d 699, 706-707 (4th Cir. 1976). Accordingly, "In resolving the issue of class certification, the court may not confine itself to the allegation of the complaint. An intelligent decision on class certification requires "at least a preliminary exploration of the merit's' claim." *Shelton v. Pargo*, 582 F.2d 1298, 1313 (1978). However, both courts in this matter ignored the holding in *Pargo*. Courts generally recognize that Rule 23 requires holding an evidentiary hearing prior to entering orders denying class certification. However, the district court judge and the

Fourth Circuit Panel pointedly declined to consider the class nature of the action on its merits by requiring the district court to hold an evidentiary hearing. .

Fed. R. Civ. P. 37(c)(1) specifically allows a court to require a party to pay reasonable expenses and attorney's fees attributable to that party's failure to provide discovery as required by Rule 26. Courts have required the payment of expenses under circumstances remarkably similar to those involved here. In *Muniz v. Meese*, 122 F.R.D. 1 (D.D.C. 1988); *EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615 (N.D. Ill. 1987); *Rivers v. American Express Centurion Services Corp.*, 184 F.R.D. 670, 671-72 (M.D. Fla. 1998) (employer was subject to sanctions for failing to comply with order to produce document even though employer's noncompliance was not willful and it acted in good faith): *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 113 (D. Colo. 1996) (a party is required to pay as a sanction for a discovery default the fees and costs which the other party would not otherwise have incurred). The sanction in this case should have included all costs incurred and the court should not have conditioned petitioners' ability to obtain a monetary award upon their counsel divulging confidential client information to respondents, which would directly affect their case and the Muhammad case.

Lastly, the court of appeals failed in its June 11, 2003 opinion to rule on petitioners sanctions issue and their issue of the district court correcting the docket sheet. Both issues were timely raised on appeal. Appeals are from judgments in the district court and all claims of error respecting the final judgment in the district court are properly appealable at one time. "The requirement of finality means that all claims must be raised in a single

appeal after judgment on the merits." *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563, 566 (6th Cir. 1986), *Stone v. INS*, 514 U.S. 386, 115 S. Ct 1537 (1995). Inasmuch that the court of appeals did not address the petitioners' motion for sanctions is it assumed that it deemed petitions improperly or failed to appeal that issue. Petitioners properly noticed their appeal and then properly filed a Supplemental Consolidated Notice of Appeal of the district court's sanction orders. Thus, petitioners were allowed to raise on appeal any district court order.

CONCLUSION

Wherefore petitioners pray that this Court grant their Petition for a Writ of Certiorari or in the alternative vacate the Fourth Circuit's June 11, 2003 decision and remand the case back with specific appropriate instructions.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-1319

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILBERT SKIPPER, JR.; MELVYN CONNOR; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR.; DAVID JONES,
Plaintiffs-Appellants,

and

GREGORY CARSON; JERRY MUNGRO,
Plaintiffs,

v.

GIANT FOOD INCORPORATED; PETER MANOS, in his official capacity; SAMUEL THURSTON, in his official capacity; MARIA MYERS, in her official capacity; ROBERT HAYWOOD, in his official capacity; DEBORAH LILLY, in her official capacity; TOM MAYNARD, in his official capacity; CHRIS BALLADEMAS, in his official capacity,
Defendants-Appellees,

And

UNITED FOOD & COMMERCIAL WORKERS UNION, Local 400,
Party in Interest.

May 9, 2003, Argued
June 11, 2003, Decided

COUNSEL: ARGUED: Jo Ann P. Myles, LAW OFFICE OF JO ANN P. MYLES, Largo, Maryland, for Appellants.

Kumiki San Gibson, WILLIAMS & CONNOLLY, L.L.P., Washington, D.C., for Appellees.

ON BRIEF: Robert P. Watkins, WILLIAMS & CONNOLLY, L.L.P., Washington, D.C., for Appellees.

JUDGES: Before WILKINS, Chief Judge, and WILKINSON and LUTTIG, Circuit Judges.

OPINION: PER CURIAM:

Plaintiffs, former and present warehouse workers at Giant Food, Inc., brought this putative class action against Giant Food and several of its managers alleging hostile work environment and disparate treatment claims. The district court denied class certification and dismissed plaintiffs' claims on summary judgment. We affirm the judgment.

I.

This action was instituted by eleven current or former African-American employees of Giant Food, Inc. The plaintiffs alleged hostile work environment and disparate treatment claims under 42 U.S.C. § 1981, along with various other federal and state claims. Nine of the original plaintiffs are involved in this appeal.

The plaintiffs in this case each held different positions with Giant and each worked in one of several different Giant warehouses. n1 Because the exact circumstances of each employee's claims are different, we shall briefly summarize the group's allegations. Plaintiffs base their hostile work environment claims on the fact that there was racist graffiti in Giant warehouses, that some of plaintiffs' Caucasian co-workers used racial epithets, and that there were three incidents over a six-year period where Giant employees hung a noose in one of the warehouses. Plaintiffs base their disparate treatment

claims on allegations that Giant disciplined plaintiffs more harshly for various workplace infractions than it disciplined Caucasian warehouse employees. Finally, plaintiffs allege that Giant discriminated against African-American vacation relief workers by hiring Caucasian workers with less seniority than the African-American plaintiffs into permanent positions.

Plaintiffs requested class certification, seeking to have two subclasses certified. Giant opposed class certification and moved for summary judgment. In recognition of the seriousness of the allegations, the district court delayed its decision on class certification until the parties had undertaken discovery and could thus provide a fuller record to the court. The court then denied plaintiffs' motion for class certification, finding that plaintiffs could not meet the commonality, typicality, and adequacy of class representation requirements under Fed. R. Civ. P. 23(a).

The district court then granted summary judgment in favor of Giant as to plaintiffs Wilbert Skipper, Jr., Melvyn Connor, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls, Jr., John Dallas, Jr., David Jones, and Jerry Mungro. Plaintiffs filed a consolidated appeal. n2

II.

Plaintiffs appeal the district court's denial of class certification and seek to have two subclasses certified. n3 The first subclass consists of "all current, former and future African American persons who were permanent union employees employed by Giant and worked at its Distribution Warehouses, including but not limited to its Jessup, Landover and Bakery Warehouses during the period of 1980 - to present." This subclass alleges violations of Title VII through Giant's hiring, promotion, discipline, termination, and training practices, and by virtue of racial harassment and a hostile work

environment. The second subclass consists of "all African American persons who are former, current and future vacation relief workers at Giant's Distribution Warehouses, including but not limited to Jessup, Landover and Bakery Warehouses who were rejected for permanent employment by Giant during the period of 1980 to present." This subclass alleges violations of Title VII with respect to Giant's hiring and promotion practices.

We apply a deferential standard of review to a district court's decision to grant or deny class certification. District courts retain "broad discretion in deciding whether to allow the maintenance of a class action." *Zimmerman v. Griffin*, 800 F.2d 386, 389 (4th Cir. 1986) (quoting *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348-49 (4th Cir. 1976)). We thus review a district court's decision to deny class certification only for an abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979).

The district court did not abuse that discretion in determining that both of the proposed subclasses failed to satisfy the prerequisites to bringing a class action. n4 *See* Fed. R. Civ. P. 23. The first subclass encompassed all unionized warehouse workers spanning a period of sixteen years. The subclass thus involved employees from over a half dozen different warehouse facilities in four different cities. During the relevant time period, there were approximately 265 different positions devoted to Giant's warehousing, recycling, or manufacturing operations. And those operations were conducted through different departments and overseen by different supervisors in each facility. Moreover, plaintiffs purport to represent warehouse workers who suffered illegal discrimination in training, despite the fact that none of the named plaintiffs sought to bring such claims individually. The Supreme Court, however,

has "repeatedly held that'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977)). Given the nature of the claims plaintiffs have pressed, the facts will vary widely from worker to worker in cases of disparate treatment, and they will vary widely from warehouse to warehouse in cases of a hostile work environment. The second proposed subclass suffers from similar infirmities. Plaintiffs Dallas and Jones admit that personal qualifications play at least some role in the hiring of vacation relief workers for permanent positions. Their claims and those of the putative class members would thus involve individualized inquiries into whether each person was qualified for the particular position for which that person applied. For example, Dallas testified that during orientation, vacation relief workers were told that Giant would consider their individual production records in determining whom to hire for permanent positions. Thus for Dallas and others to succeed on their claims, they would have to demonstrate that their personal production records merited a permanent position.

Given the individualized nature of plaintiffs' claims in each subclass, we hold that the district court did not err in holding plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a).

We also find no error in the district court's conclusion that adequacy of class representation was lacking in this case. *See* Fed. R. Civ. P. 23(a)(4). The district court noted that class counsel had made significant errors in this action, both of substance and form. The court further questioned counsel's financial ability to

represent a class of this size, noting that plaintiffs' expert had already threatened to withdraw from the case and to file a lawsuit over the late payment of fees.

Finally, even if plaintiffs could satisfy the prerequisites to class certification under Rule 23(a), certification would still be improper in this case because plaintiffs cannot satisfy any of the Rule 23(b) criteria. Plaintiffs do request injunctive and declaratory relief. However they also seek damages in the amount of one hundred thirty-nine million four hundred thousand dollars ($ 139,400,000.00). Their case is more properly viewed as one for monetary relief. *See* Fed. R. Civ. P. 23(b)(2); *Zimmerman*, 800 F.2d at 389.

And plaintiffs also cannot satisfy Rule 23(b)(3). "Even if Rule 23(a)'s commonality requirement may be satisfied . . . the predominance criterion [under Rule 23(b)(3)] is far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). The Rule 23(b)(3) inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. In revising Rule 23 in 1966, the Advisory Committee noted that cases likely to present significant questions of damages, liability and defenses are "'ordinarily not appropriate'" for class treatment. *Id.* at 625 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 705 (2000)). Here again, the individualized measure of plaintiffs' claims for damages reinforces the district court's conclusion that questions affecting only individual members would predominate over common questions of law or fact. *See* Fed. R. Civ. P. 23(b)(3).

Given the disparate circumstances of the putative class members and the nature of relief plaintiffs seek, we hold that the district court's denial of class certification was not an abuse of discretion.

III.

Plaintiffs next argue that Giant maintained a racially hostile work environment in its warehouses. Like the district court, we recognize that "racial hostility existed between African-American workers and white workers at the Giant warehouses from 1980 to the time this suit was initiated in 1996." However, we also agree with the district court that none of the plaintiffs presented an issue of triable fact.

To sustain a cause of action for a racially hostile work environment, a plaintiff must show: 1) unwelcome harassment; 2) that the harassment was based on race; 3) that the harassment was so severe or pervasive that it altered the conditions of employment and created an abusive atmosphere; and 4) that there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). Courts look at the totality of circumstances to determine whether an environment is hostile or abusive, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).

The allegations of the individual plaintiffs as to hostile work environment vary both in severity and specificity. We take up what seems the strongest of the claims in order to illustrate the vagueness with which all the claims were pressed.

Wilbert Skipper, Jr., a produce selector in the Landover warehouse, alleges that his manager harassed him by following him throughout the warehouse and referring to him by a racial slur on one occasion. Skipper further alleges that he overheard Caucasian workers using the

same racial slur thirteen times in the four years prior to filing this lawsuit, and that he was exposed daily to racist graffiti in warehouse trailers and restrooms.

Skipper's allegations are probably the most specific of the plaintiffs, and he has alleged exposure to racist graffiti with the most frequency. The allegations are still, however, insufficient to support a racially hostile work environment claim. The district court was quite right to recognize that the content of the graffiti "was as offensive as one can imagine." But we cannot judge the severity of the graffiti without looking at the context in which it appeared. The record establishes that the graffiti, for the most part, appeared in regular sized print scattered amidst a significant amount of other non-racist graffiti. Moreover, most of the graffiti involved in each plaintiff's claims occurred inside 45-foot long trailers that were moved to and from the warehouses, and in the bathrooms. However Skipper admitted that because the trailers were constantly being moved, he had no idea whether Giant had removed the graffiti from any of the trailers. And on the few occasions where Skipper accompanied Giant managers to view the graffiti, those managers immediately removed it. The presence of offensive graffiti alone cannot sustain Skipper's claim.

Skipper also complains that he overheard white workers use racial epithets in the warehouse. However he could not recall the name of even a single white employee who uttered the offensive words, aside from one incident involving a Giant manager. This court has held that a plaintiff pressing a hostile work environment claim must substantiate his claim with reasonable specifics about the alleged incidents that underlie the claim. *Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994). We decline to depart from that rule today.

The other plaintiffs' claims, which were even less specific than Skipper's, fare no better. For instance,

Melvyn Connor alleges that he viewed racist graffiti in the warehouses, but he cannot testify as to any dates on which he viewed the graffiti or even the frequency with which he viewed it. These defects in plaintiffs' claims are significant: many of them fail to allege with any specificity the content of the graffiti; the frequency with which they saw it; or how it altered the terms and conditions of their employment. In fact, several of the plaintiffs fail to adduce evidence that the hostile conduct they allege was even based on race. n5

And significantly, many of the plaintiffs fail to adduce any basis for imputing liability to the defendant. Giant maintains a clear anti-harassment and non-discrimination policy that is published in various company manuals and in a pamphlet mailed to each employee's home upon accepting employment with Giant. In addition, Giant maintains a Fair Employment Office to ensure compliance with these policies, as well as an Office of Minority Affairs to specifically focus on the needs of minority employees. Despite the resources available to address plaintiffs' complaints, many of the plaintiffs failed to inform Giant of the alleged misconduct. For instance, Skipper admits that he neither filed a union grievance nor a complaint with the Fair Employment Office regarding any of the offensive graffiti. In fact, prior to the lawsuit Skipper never even notified a single Giant manager about the graffiti in the bathrooms. And in those instances where plaintiffs did complain to managers, Giant addressed the problems.

Plaintiffs have thus failed to demonstrate two essential elements of their claims: that they experienced harassment so severe as to alter the terms and conditions of their employment, and that Giant knew or should have known about such harassment and failed to address it. Given these deficiencies, we must affirm the

district court's dismissal of plaintiffs' hostile work environment claims.

IV.

Plaintiffs next allege that Giant subjected them to discriminatory or disparate treatment by disciplining them more severely than their Caucasian co-workers. In order to succeed on this claim, each plaintiff must establish that: 1) he is a member of a protected group; 2) he was qualified for the job and his performance was satisfactory; 3) he suffered an adverse employment action despite his qualifications and performance; and 4) other similarly situated employees outside the protected class were treated more favorably. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 233 (4th Cir. 1999) (en banc). If the plaintiffs thus create a prima facie case, the burden then shifts to defendants to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). At this point, the "presumption of discrimination 'drops out of the picture,'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)), and the burden shifts back to the plaintiff to demonstrate that the employer's stated reason "was in fact pretext." *McDonnell Douglas*, 411 U.S. at 804. Despite these shifting burdens, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 530 U.S. at 143 (quoting *Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)).

Plaintiffs' disparate treatment claims suffer many of the same deficiencies as their hostile work environment claims. Although plaintiffs allege that other similarly

situated employees outside the protected class were treated more favorably, they offer little evidence to support such allegations. For instance, Anthony Blocker complains that he was denied the opportunity to participate in the modified duty program after being injured on the job, while other similarly situated Caucasian workers were allowed to participate in the program. Aside from listing their names and races, however, Blocker offers no evidence that these individuals were similarly situated beyond the fact that they were "temporarily disabled." In fact, Blocker admitted that he could not testify as to the nature of the injuries of white workers in the modified duty program. We thus are presented with no evidence that white employees with similar injuries to Blocker were allowed to enter the program while Blocker was not. *See Carter*, 33 F.3d at 460-61.

Other plaintiffs fail to demonstrate that they have suffered adverse employment actions. For instance, David Newman alleges that he suffered disparate treatment when Giant initially denied him a no-interest emergency loan (which Giant granted shortly after the initial denial), when he was disciplined for arriving late to work, and when a manager discussed with him the appropriateness of taking sick leave on the same day each month. However none of these allegations in any way evidence a change in the terms, conditions, or benefits of Newman's employment. *See Von Gunten v. Maryland*, 243 F.3d 858, 868 (4th Cir. 2001) (change in work assignment which did not affect salary, benefits, job title, or nature of the work did not constitute adverse employment action).

More importantly, even if plaintiffs could make out a prima facie case, the defendant has offered legitimate and unrebutted reasons for its actions. Giant has indicated that the individual plaintiffs involved engaged

in workplace conduct that transgressed workplace rules. For the most part, plaintiffs do not even dispute Giant's claims that they regularly arrived late for work (Newman); were inexplicably absent without notifying Giant in accordance with Giant's absence policy (Mathews); took unexcused sick leave (Ingram); and violated Giant's rules of conduct through involvement in a physical altercation with a coworker (Connor). Plaintiffs uniformly argue that Giant's proffered justifications are only pretext. But the bare allegation that white coworkers also committed similar infractions but were not disciplined, without evidence to substantiate that claim, is not sufficient to overcome Giant's nondiscriminatory reasons for its actions.

V.

Plaintiffs have failed to meet the Rule 23 class certification requirements for their individualized claims. Plaintiffs have also failed to adduce evidentiary support for their allegations under the legal framework enunciated by the Supreme Court. The judgment of the district court is therefore

AFFIRMED

Footnotes

n1 The one exception is Plaintiff W. Kirb Qualls, Jr., who worked at Giant Store # 50.

n2 Plaintiff Jerry Mungro did not appeal the district court's decision.

n3 After all papers were filed in the district court and the parties had conducted oral argument, plaintiffs' counsel filed a supplemental memorandum in support of plaintiffs' motion for class certification in which counsel changed the definitions of the proposed subclasses. Finding that the memorandum had not been filed in a

timely manner, the district court declined to address the amended subclasses and we decline to do so as well.

n4 Plaintiffs also argue that we should reverse the district court's refusal to certify the proposed classes because the district court allegedly decided the merits of the case before ruling on class certification. It is not clear from the record that the district court actually ruled on the merits of the summary judgment motion first. Moreover, Fed. R. Civ. P. 23(c)(1) requires only that the question of class certification be decided "as soon as practicable after the commencement of an action brought as a class action." Plaintiffs have not demonstrated that the district court ran afoul of this requirement.

n5 Plaintiffs urge us not only to ignore the vagueness of their claims, but also to consider acts that occurred well outside the applicable three-year statute of limitations in this case. *See Grattan v. Burnett*, 710 F.2d 160, 162 (4th Cir. 1983). However we need not consider whether the time-barred acts "are part of the same unlawful employment practice" as the acts within the limitations period because plaintiffs' claims would suffer the noted infirmities in any event. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002).

Civil Action No.: JFM-96-2882

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, et al.,
Plaintiffs

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For GREGORY CARSON WILBERT SKIPPER, JR., MELVYN CONNORS, WILLIAM INGRAM, DAVID NEWMAN, ANTHONY BLOCKER, MAURICE MATHEWS, W. KIRB QUALLS, JR., JOHN W. DALLAS, JR., DAVID JONES, plaintiffs: JoAnn Patricia Myles Law Office, Largo, MD USA. Oscar L. Amorow, Hyattsville, MD USA.

For JERRY MUNGRO, plaintiff: William Michael Jacobs, Law Office of W. Michael Jacobs, Columbia, MD USA.

For GIANT FOOD, INC., defendant: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA. Mark Scott London, London & Mead, Washington, DC USA. Claudette V. Ferron Law Office, Washington, DC USA.

For PETE MANOS, defendant: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Williams and Connolly LLP, Washington, DC USA. Mark Scott

London, London & Mead, Washington, DC USA. Claudette V. Ferron Law Office, Washington, DC USA.

For SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Williams and Connolly LLP, Washington, DC USA. Mark Scott London, London & Mead, Washington, DC USA. Claudette V. Ferron Law Office, Washington, DC USA.

For UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, interested party: Marc A. Stefan, Carey R. Butsavage, Butsavage and Associates, Washington, DC USA.

OPINION:

Eleven plaintiffs have instituted this action against Giant Food, Inc. and several of its executives and managers, alleging employment discrimination. Nine of the plaintiffs have filed a motion for class certification. Although the propriety of class action treatment appeared doubtful on the face of the complaint, I did not want to judge the issue prematurely, particularly in light of allegations concerning racist graffiti, racial epithets used by co-workers and supervisors, and the display of nooses at Giant's warehouses. Accordingly, I permitted a full factual record to be developed before ruling on the class certification motion. That motion is now pending, together with motions for summary judgment filed by defendants as to the individual claims of each of the plaintiffs.

This opinion addresses several global issues raised by the litigation, relating to (1) class certification, (2) the effect of "early" right-to-sue notices issued by the Equal Employment Opportunity Commission ("EEOC"), (3) the

applicability of the "continuing violation" doctrine to plaintiffs' claims, (4) the cognizability of various state law claims, and (5) a claim under 42 U.S.C. § 1981 against the individual defendants. It also addresses all of the claims asserted by Gregory Carson, the first named plaintiff, and hostile environment claims asserted by eight of the plaintiffs. I am issuing separate opinions addressing the merits of all of the other claims asserted by the ten other plaintiffs. n1

I.

Plaintiffs seek to have two subclasses certified: n2 (1) "all current, former and future African American ("Black") persons who were permanent union employees employed by Giant and worked at its Distribution Warehouses, including but not limited to Jessup, Landover and Bakery Warehouses during the period of 1980 to present;" n3 and (2) "all African American ("Black") persons who are former, current and future vacation relief workers at Giant's Distribution Warehouses, including but not limited to Jessup, Landover and Bakery Warehouses who were rejected for permanent employment by Giant during the period of 1980 to present." n4 (See Pl. Amended Mem. for Class Cert. at 4-5.) The first subclass alleges violations of Title VII through hiring, promotion, discipline, termination, training, racial harassment and hostile work environments, and Giant's fair employment and grievance process. n5 The second subclass alleges violations of Title VII regarding Giant's hiring and promotion practices.

The burden is on Plaintiffs to demonstrate that their proposed classes meet the certification requirements of Fed. R. Civ. P. 23. First, they must show that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – are met. Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161,

72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). If those prerequisites are satisfied, Plaintiffs must then demonstrate that their proposed subclasses fit into one of the categories set forth in Rule 23(b). See Miller v. Baltimore Gas & Elec. Co., 202 F.R.D. 195, 198 (D. Md. 2001) (citing Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)). Here, although Plaintiffs' first proposed subclass presumably would meet the numerosity requirement of Rule 23(a), n6 neither it nor the second proposed subclass meets the other three requirements. Both subclasses also fail under Rule 23(b).

A.

The commonality requirement of Rule 23(a) is "more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim." Stastny v. Southern Bell Tel. and Tel. Co., 628 F.2d 267, 274 n. 10 (4th Cir. 1980). A disparate impact theory is based upon a practice or policy which is neutral or benign in intent but nevertheless has a disproportionately adverse impact upon a protected class without any business justification for the disproportionate impact. Id. at 273-74 (citing Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971)).

Plaintiffs have not identified any neutral practice or policy that lies at the basis of their claims. Rather, it is clear that what Plaintiffs are claiming is that African-Americans were subjected to disparate treatment. That fact alone would not necessarily preclude class action treatment. For example, it has been held that "the use of entirely subjective personnel processes that operate to discriminate . . . satisfy the commonality and typicality requirements of Rule 23(a)." Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993). Here, however, the record is clear that although the disciplinary decisions about

which Plaintiffs complain were individualized, they were not entirely subjective in nature but involved the application of general rules to particular employees.

In short, as reflected in my discussion of Giant's summary judgment motions as to the claims of individual employees, in effect, this litigation involves an aggregate of individual disparate treatment claims. n7 Moreover, during the course of their careers, the putative class members worked in at least thirteen different facilities, located in five different towns or cities. This geographical diversity itself would make class treatment inappropriate. See Stastny, 628 F.2d at 278-79; Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 542 (N.D. Ala. 2001); Zachery v. Texaco Exploration and Prod., Inc., 185 F.R.D. 230, 238-40 (W.D. Tex. 1999); Bostron v. Apfel, 182 F.R.D. 188, 195 (D. Md. 1998). n8

For these reasons, Plaintiffs have not shown that their proposed subclasses meet the commonality and typicality requirements. Even if they had done so, I could not find that they would adequately represent the class. n9

The adequacy of representation element requires both the class representatives and the class attorney to adequately represent the class. In this case, Jo Ann P. Myles, Esq., cannot adequately represent the proposed subclasses. Ms. Myles' frequent typographical errors, citation errors and clear misstatements of the law in memoranda and during oral argument prove that the interests of the putative class members will not be adequately served by her representation. Additionally, Ms. Myles has failed to include deposition pages that were essential to her clients' claims, thus, requiring the Court to ask for those transcript pages. Finally, significant financial resources (e.g., to provide notice and to retain experts) are required to represent a class of this size. The history of this litigation, including a

dispute between the plaintiffs and their expert over payment, demonstrates the inability of Ms. Myles and the class representatives to meet the financial demands of representing the proposed classes.

B.

Although Plaintiffs' failure to demonstrate that their proposed subclasses would meet the commonality, typicality, and adequacy of representation requirements of Rule 23(a) is dispositive of the certification question, I will add that the highly individual nature of Plaintiffs' individual claims also would preclude certification under Rule 23(b)(3). Clearly, it cannot be said that whatever common questions of law or fact there might be "predominate over questions affecting only individual members." Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539, 563 (D.S.C. 2000). Certification also would be inappropriate under Rule 23(b)(2) because the final relief that would be appropriate were Plaintiffs to prevail would not be injunctive in nature but would "relate[] exclusively or predominately to money damages." See Fed R. Civ. P. 23(b)(2) advisory committee's note; Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986). In this case, Plaintiffs have asked almost exclusively for money damages.

II.

Each plaintiff was issued a right-to-sue notice fewer than 180 days after he filed a charge of discrimination. Giant argues in its motions for summary judgment that the plaintiffs' Title VII claims are invalid because Title VII does not allow the EEOC to issue a right-to-sue notice fewer than 180 days after the plaintiff files a charge of discrimination. For the reasons stated below, I find that the early right-to-sue notices provided by the EEOC are valid.

Title VII provides in relevant part:

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.

42 U.S.C. § 2000e-5(f)(1). The EEOC has established a regulation that allows it "to issue a right to sue letter at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided that [an appropriate Commission official] has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge." Miller, 202 F.R.D. at 206 (citing 29 C.F.R § 1601.28(a)(2) (1998)). The validity of this regulation has been a topic of litigation, resulting in a circuit split on the issue. The D.C. Circuit found the regulation invalid and required that "Title VII complainants must wait 180 days after filing charges with the EEOC before they may sue in federal court." Martini v. Fed. Nat. Mortgage Ass'n, 336 U.S. App. D.C. 289, 178 F.3d 1336, 1347 (D.C. Cir. 1999). Defendant relies on Martini in its argument. The Ninth, Tenth and Eleventh Circuits have held that the regulation is a valid exercise of authority by the EEOC. See Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1273-77 (10th Cir. 2001); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061-63 (11th Cir. 1994); Brown v. Puget

Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984).

The Fourth Circuit recently declined to address the issue. See Microstrategy, Inc. v. Lauricia, 268 F.3d 244, 248 (4th Cir. 2001). However, two judges in this district have recently upheld the EEOC regulation. See Miller, 202 F.R.D. at 206; Thomas v. BET Sound-Stage Restaurant/BrettCo, Inc., 61 F. Supp. 2d 448, 459 (D. Md. 1999). But see Loney v. Carr-Lowrey Glass Co., 458 F. Supp. 1080, 1081 (D. Md. 1978). I agree with the reasoning of those cases and find the Plaintiffs' Title VII claims to be timely.

III.

Each plaintiff asserts various claims under Title VII and section 1981. n10 Under Title VII, a plaintiff in a "deferral state," a state that has its own law prohibiting discrimination and an agency enforcing the law, has 300 days after the alleged act of discrimination to file a claim with the EEOC. See Nye v. Roberts, 159 F. Supp. 2d 207, 210 (D. Md. 2001). n11 Section 1981 has a three-year statute of limitations in Maryland. See Derrickson v. Circuit City Stores, Inc., 84 F. Supp. 2d 679, 687 (D. Md. 2000). This suit was initiated on September 12, 1996 on behalf of all plaintiffs. Therefore, claims dating back to September 12, 1993 are valid under section 1981.

Plaintiffs assert that the continuing violation doctrine should apply to their Title VII and section 1981 claims. It operates to save certain unexhausted, otherwise time-barred claims. See Muhammad v. Giant Food, Inc., 2000 U.S. Dist. LEXIS 21949, 2000 WL 1828248, at *3 (D. Md. 2000). A "continuing violation" occurs in two types of cases: those involving serial discrimination and those involving systemic discrimination. See Redding v. Anne Arundel County, 996 F. Supp. 488, 490 (D. Md. 1998). "A serial violation

exists when an employer engages in a series of discriminatory actions derived from 'the same discriminatory animus.'" Id. (citations omitted). A plaintiff must demonstrate that the discrimination complained of is more than isolated or sporadic to establish a serial violation. Id. Systemic violations, on the other hand, occur "where an express policy of unlawful discrimination exists, requiring the plaintiff to prove that the policy 'manifests itself over time.'" Id. (citations omitted). There are two general considerations in determining whether there is a continuing violation: "whether the separate incidents are sufficiently related, and whether the acts individually should have triggered the plaintiff's awareness of and duty to challenge the employer's discriminatory conduct." Muhammad, 2000 U.S. Dist. LEXIS 21949, *10, 2000 WL 1828248, at *3.

The claims of the plaintiffs involve isolated and sporadic incidents of harassment. n12 For example, Plaintiff Newman attempts to invoke the continuing violation doctrine as to a single incident in 1990 when he was asked an offensive question about race by a white manager. Similarly, Plaintiff Mathews asserts that a sole incident where the word "nigger" was inscribed in large bright letters in his locker in the mid-1980's should not be time-barred. These incidents were clearly discriminatory and should have been challenged at the time they occurred. Cf. Hill v. AT&T Techs., Inc., 731 F.2d 175, 179-80 (4th Cir. 1984) (stating that an allegation that the continuing violation doctrine applies does not constitute "a talismanic or shibboleth term automatically relieving a claimant of any obligation to comply with the statutory time requirement for the filing of a charge with the EEOC under Title VII"). Accordingly, the continuing violation doctrine does not apply to the plaintiffs' claims under Title VII or section 1981.

IV.

I will now consider the hostile work environment claims asserted by Plaintiffs. The record before me clearly demonstrates that racial hostility existed between African-American workers and white workers at the Giant warehouses from 1980 to the time this suit was initiated in 1996. On at least four occasions, nooses were displayed in the warehouses. n13 Likewise, racist graffiti written on the walls of trailers used to transport products from the warehouses to Giant's retail stores was a constant problem. Finally, there is evidence that managers and supervisors used racist epithets and made other racially offensive remarks.

These incidents, whether considered alone or together, are reprehensible. However, the different plaintiffs had substantially different experiences and the hostile work environment claim of each plaintiff must be considered on its own individual merits. I have concluded that only the claim of Gregory Carson under section 1981 survives summary judgment.

A.

Carson was a dockman in the Jessup warehouse beginning in 1990. At unspecified times from 1993 to 1995, white co-workers of Carson would throw bananas at him and make ape noises on the warehouse microphone. While this was occurring, Mike Majors, one of Giant's managers, would laugh at the white employees, but would not discipline or stop them. On several occasions during 1994 and 1995, a white co-worker called Carson a "nigger." (Carson Dep. at 296.) Sometime in 1995, Majors remarked to Carson that white people could send people to the moon, but black people were only good for sticking bones through their noses. n14 (Id. at 280.) Also in 1995, Majors placed dough in the front zipper of his pants and said that he

was depicting a black penis, commenting that black men have larger penises. (Id. at 132-33.)

At indefinite times during Carson's employment, white managers would point to racist graffiti in warehouse trailers depicting African-Americans with big lips and noses and tell Carson that the graffiti reminded them of Carson. (Id. at 43-44.) On January 1, 1996, a van being driven by a white employee, available to drive employees one mile from the parking lot to the warehouse, would not stop for Carson. On January 18, 1996, a white employee posted pictures of monkeys and apes in the warehouse and wrote Carson's name under one of the pictures. Carson had to remove the pictures himself, a full day after they were posted and viewed by several employees, including managers. (Id. at 133-38.) On several occasions, white employees would arrive at work and spend up to 30 minutes reading the paper and drinking coffee without suffering any discipline while Carson was screamed at by a manager for reporting to the warehouse floor a few minutes late. Until 1997, there were two locker rooms at the warehouse. The smaller, less desirable locker room was assigned to all African-American employees and one white employee. It was referred to as the "nigger locker room" by white managers and employees. n15 Carson's locker was in this smaller locker room. (Id. at 171-79.)

Wilbert Skipper, Jr., a produce selector in the Landover warehouse, claims that a manager, Bob Bennett, called him a "nigger" and harassed him by following him throughout the warehouse. He states that he overheard white co-workers use the term "nigger" in the warehouse approximately thirteen times in the four years prior to his filing suit n16, and that he was exposed daily to racist graffiti in truck trailers and restrooms that included such statements as, "Kill all niggers at Giant Foods," "Black babies are crack babies"

and "KKK will kill all niggers at Giant Foods." (Skipper Dep. at 246-50, 262, 267-69.) n17

William Ingram, a produce selector in the Landover warehouse, allegedly was exposed daily to racist graffiti scrawled on Giant truck trailers, including such epithets as "kill all niggers at Giant Food." n18

David Newman, an employee in the Landover warehouse who held several positions, viewed racially offensive graffiti in the bathrooms and trailers that included the words "monkey" and "nigger." Newman does not specifically describe any of the graffiti or how often he saw it.

Melvyn Connor, a dockman in the Jessup warehouse, has provided specific evidence of only one alleged incident of harassment after September 12, 1993: seeing a hanging noose in the warehouse in 1995. n19 Additionally, Connor witnessed racist graffiti during his last several years of employment before he was terminated in 1995.

Maurice Mathews, an employee in the Landover warehouse, was exposed to racist graffiti in the trailers that included the word "nigger" and to pictures of apes and monkeys labeled with the names of other African-American employees. n20

Jerry Mungro, a truck driver, alleges that Chris Balodemas, the head of Giant's Transportation Department, said in response to a comment by Mungro about forgetting to contact dispatchers when he was delayed: "I see you didn't forget to put on your gold chains when you got dressed this morning." Additionally, Mungro states that one white driver would make comments over the CB radio such as, "Nigger, get off the CB, go lay your nappy head down." Finally, he claims he saw racist graffiti on Giant truck trailers that

included "hanging nooses" and words like "niggers," "spear chuckers," and "bush boogers."

Finally, Kirb Qualls, an employee at the produce department in Giant Store # 50, had his car tires slashed on four occasions from November 1994 to August 1996. There were also instances of graffiti concerning Qualls, but none included racially derogatory content. n21

B.

A prima facie case of hostile work environment consists of the following elements:

> (1) the harassment was unwelcome;
> (2) the harassment was based on [Plaintiff's] race . . . ;
> (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and
> (4) there is some basis for imposing liability on the employer.

Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998). The plaintiffs fall into four groups based on the alleged harassment they experienced: (1) Carson, who alleges inappropriate harassment by managers during the relevant time period and graffiti specifically aimed at him; (2) Skipper and Ingram, who allege with specificity the content and frequency of the racist graffiti they saw in warehouse trailers; (3) Newman, Connor, Mathews and Mungro, who allege that they witnessed offensive graffiti in the trailers, but do not allege how often they saw the graffiti and, with the exception of Mungro, do not specifically describe the graffiti; and (4) Qualls, who did not work in Giant warehouses and only alleges isolated instances of harassment that are not established to be based on race. It is undisputed that the harassment of the plaintiffs, other than Qualls, was unwelcome and

based on race. Therefore, my analysis as to those plaintiffs' claims will focus on the final two elements.

C.

Several factors are considered when determining the severity and pervasiveness of harassment: "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating or a mere offensive utterance; and (4) whether it unreasonably interferes with [the] employee's work performance." Smith v. First Union Nat. Bank, 202 F.3d 234, 242 (4th Cir. 2000) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)).

1.

Carson experienced significantly worse harassment during the relevant time period than the other plaintiffs. The incidents of harassment were frequent during the period in question, several remarks or actions were specifically directed at Carson and most incidents involved the highly offensive word "nigger" or comparably offensive language or conduct. Additionally, many incidents involved Carson's managers or supervisors, which is particularly troubling. Moreover, Carson's co-workers are able to "buttress" some of his claims. See e.g., Collier v. RAM Partners, Inc., 159 F. Supp. 2d 889, 899-900 (D. Md. 2001); see also Mundell Aff. P 10 (verifying that pictures of apes and monkeys were displayed in the warehouse); Isaac Aff. P 9 (explaining that the parking lot van would not stop for African-American employees). Thus, the alleged harassment experienced by Carson is clearly actionable under section 1981. n22

2.

The claims of Skipper and Ingram essentially consist of allegations of offensive racist graffiti they viewed daily. n23 Skipper was also called "nigger" by his manager on one isolated occasion. n24 Sexist and racist graffiti certainly contribute to the existence of a hostile work environment. See, e.g., Carter v. Chrysler Corp., 173 F.3d 693, 701 n.7 (8th Cir. 1999) (finding graffiti relevant to hostile environment); Waltman v. Int'l Paper Co., 875 F.2d 468, 478 (5th Cir. 1989) (finding graffiti and other incidents of harassment created a dispute as to whether the workplace was a hostile environment). Plaintiffs have not, however, cited any case (and I have found none) where graffiti alone has been found sufficient to establish severe and pervasive harassment.

Here, the content of the graffiti was as offensive as one can imagine, and Skipper and Ingram testified they viewed it daily. However, the severity and pervasiveness of the graffiti must be considered in context. The record establishes that the graffiti was written in 45-foot-long trailers that were driven to the warehouses or on the walls of the bathrooms. It appeared amidst other tasteless but non-racist graffiti of all sorts, and it was written in regular size. Although offensive to African-Americans (and anyone with good sense and good values), it was not menacing but simply reflected the unfortunate fact that there are prejudiced people in the world. Moreover, none of the graffiti was directed personally at Skipper or Ingram, contrary to most cases in which graffiti is found to be part of a hostile work environment. See e.g., Chrysler, 173 F.3d at 701. Under these circumstances, I do not find that the graffiti standing alone satisfies the third element of a prima facie case. n25

3.

The claims of Newman, Connor, Mathews and Mungro consist of allegations of offensive racist graffiti, including the word "nigger," and pictures of monkeys that appeared in trailers and bathrooms. However, unlike Skipper and Ingram, Newman, Connor, Mathews and Mungro are unable to describe with specificity how often they viewed the graffiti. Newman, Connor and Mathews also are unable to describe the specific content of the graffiti they viewed. n26 For the reasons discussed above, the graffiti in the trailers is not sufficient to establish a prima facie case of a hostile work environment.

4.

The hostile work environment claim of Qualls is different from the claims of the plaintiffs employed at the warehouses. Qualls' claim consists of four tire slashing incidents and graffiti. Qualls has presented no evidence the tire slashings or graffiti were based on race. Therefore, these allegations cannot support a claim of hostile work environment. See Jackson v. Maryland, 171 F. Supp. 2d 532, 541 (D. Md. 2001); Smith v. Allied Sys., Ltd., 2000 WL 708909, at *5 (D. Md.2000), aff'd, 232 F.3d 889 (4th Cir.2000). n27

D.

Giant's primary challenge to Carson's prima facie case is that he cannot establish the fourth element – a basis for imposing liability on Giant. In this case, incidents of harassment involved Carson's supervisors and co-workers. A separate analysis is required for each.

For incidents involving supervisors or managers, agency principles have been applied in determining whether the employer is liable. In Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 141 L. Ed. 2d 662, 118

S. Ct. 2275 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), the Supreme Court established a defense whereby an employer can avoid liability for a supervisor's sexual harassment of an employee. n28 This defense consists of two elements that must be established by a preponderance of the evidence: (1) "that an employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807.

First, Giant has presented sufficient evidence that it had an anti-harassment policy in place at the time of the events. "Distribution of an anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting . . . harassment." Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001); accord Lissau v. S. Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998). Giant set forth policies that were in place from 1991 to the present that described Giant's alleged dedication to fair employment and creating a safe work environment free of harassment. (See Harris Dec. PP 12-19.) This policy stated that incidents of harassment "should be reported directly and promptly" to the FEO at Giant. (See Carson Mem. Exs. C, F and H.) The policy was set forth in Giant's employee handbook and in pamphlets and outlined on large posters displayed in the common areas at Giant. (See Harris Dec. PP 17-19.)

Giant argues that the second element is satisfied because Carson failed to complain to the FEO. An employee's "failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer's burden under" this element.

Ellerth, 524 U.S. at 765 (emphasis added). In this case, Giant argues that Carson did not complain to the FEO, except once in 1990. (See Carson Mem. at 23; Carson Dep. at 46-49, 56.) However, Carson did complain to warehouse managers and supervisors on numerous occasions. (See, e.g., Carson Dep. at 133 (stating that he complained to Manager Tom Maynard about the incident where Majors placed dough in his zipper); Carson Dep. at 178 (stating that he complained about the locker room segregation and conditions); Carson Dep. at 281 (stating that he complained to Maynard about Majors' racially offensive jokes.)) n29 The Faragher Court observed "that a victim has a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." 524 U.S. at 806. There is no strict requirement that an employee follow an exact reporting procedure set forth by an employer. Furthermore, the Fourth Circuit has stated that complaining to one's managers satisfies the plaintiff's reporting requirement. See E.E.O.C. v. R&R Ventures, 244 F.3d 334, 341 (4th Cir. 2001) ("[The plaintiffs] . . . complained at virtually every opportunity available. It therefore cannot be said, as a matter of law, that [the plaintiffs] failed to take advantage of any corrective opportunities."). Additionally, the Giant policy itself states that an employee "should," not "must," report incidents to the FEO. (See Carson Mem. Ex. C, F and H; see also Carson Mem. Ex. 1 (stating that there are a number of fair employment policies, not one single policy to be followed.)) Moreover, if the Giant policy had been strictly followed, Carson's managers and supervisor who knew of the incidents should have themselves reported the incidents to the FEO. They did not. Therefore, Giant has not satisfied the second element of the Faragher/Ellerth defense and can be held liable for the racial harassment by its managers.

For incidents involving co-workers, an employer may be found liable "only for [its] own negligence in failing, after actual or constructive knowledge [of the harassment], to take prompt and adequate action to stop it." Mikels v. City of Durham, N.C., 183 F.3d 323, 332 (4th Cir. 1999). Giant argues that there is no evidence it should have known of the alleged harassing conduct Carson was being subjected to by co-workers. However, Carson has presented evidence that he complained to 3 managers about the actions. (See Carson Dep. at 138-39 (stating that he complained to warehouse manager Maria Myers about the pictures of monkeys and gorillas); Carson Dep. at 296 (stating that he complained to Maynard about a co-employee calling him a "nigger.")) In some instances, managers and supervisors witnessed and laughed at the conduct. (See, e.g., Carson Dep. at 137 (stating that Majors watched and laughed as a co-worker hung up the pictures of monkeys and gorillas.)) Therefore, Giant managers knew about the alleged harassing conduct and Giant can be held liable for the racial harassment by Carson's co-workers. Carson has established all of the elements of a prima facie case.

V.

Plaintiffs have asserted claims against Giant and several individual defendants, who were employed in various managerial and supervisory positions at Giant during the employment periods of the plaintiffs, for quantum meruit, discrimination under the Maryland Fair Employment Practices Law, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and wrongful termination. n30 The defendants' motions for summary judgment will be granted as to these claims.

A.

"A recovery under a theory of quantum meruit generally 'is not applicable when compensation of the parties is covered by an express written contract.'" Abt Assoc., Inc. v. JHPIEGO Corp., 104 F. Supp. 2d 523, 534 (D. Md. 2000) (quoting Mass Transit Admin. v. Granite Constr. Co., 57 Md. App. 766, 471 A.2d 1121, 1126 (Md. Ct. Spec. App. 1984). The rationale of a claim based on a theory of quasi-contract is that a defendant should not be unjustly enriched by a benefit bestowed upon it by the plaintiff. Id. When there is no real promise by defendant to pay plaintiff, the law thus implies such a promise. Id. Conversely, where an actual promise to pay does exist, there is no need to imply one. Id. (citing Attorney Grievance Comm'n v. McIntire, 286 Md. 87, 405 A.2d 273 (Md. 1979)). In this case, each Plaintiff was a member of a local union and each plaintiff's employment terms were covered under the collective bargaining agreement between Giant and his union.

Plaintiffs argue that the collective bargaining agreements do not cover every matter of services and compensation and thus are not express contracts in this situation. It is true that "when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice." Klein v. Arkoma Prod. Co., 73 F.3d 779, 786 (8th Cir. 1996). However, Plaintiffs have pointed to no evidence demonstrating that any of them performed extra service not covered by the collective bargaining agreement governing their relationship with Giant.

B.

Maryland Fair Employment Practices Law, Md. Code Ann., art. 49B § 14 ("Article 49B") does not provide a private cause of action. See Maryland Comm'n on Human Relations v. Downey Communications, Inc., 110

Md. App. 493, 678 A.2d 55, 79 (Md. 1996); see also Jordan v. CSX Intermodal, Inc., 991 F. Supp. 754, 756 n. 1 (D. Md. 1998) (stating that Article 49B "empower[s] only the Maryland Human Rights Commission to initiate litigation upon an employer's refusal to comply with the Commission's orders" and "does not create a private cause of action"). n31 Article 49B is a state administrative remedy that only provides for injunctive relief. See Makovi v. Sherman-Williams Co., 75 Md. App. 58, 540 A.2d 494, 498 (Md. Ct. Spec. App. 1988), aff'd, 561 A.2d 179 (Md. 1989).

C.

To support a prima facie case of intentional infliction of emotional distress, a plaintiff must show: (1) the conduct is intentional or reckless; (2) the conduct is extreme and outrageous; (3) there is a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress is severe. White v. Maryland Trans. Auth., 151 F. Supp. 2d 651, 658 (D. Md. 2001). The fourth element "requires the plaintiff to show that he suffered a severely disabling emotional response to the defendant's conduct." Bryant v. Better Bus. Bureau of Greater Maryland, Inc., 923 F. Supp. 720, 748 (D. Md. 1996) (quoting Harris v. Jones, 281 Md. 560, 380 A.2d 611, 616 (Md. 1977) (emphasis in original). "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." Bryant, 923 F. Supp. at 748-49. In Bryant, the plaintiff felt demeaned, humiliated and suffered extreme mental anguish and outrage. Additionally, the plaintiff suffered from irritable bowel syndrome, needed counseling by a therapist, had disturbed sleep, was in a depressed mood and was placed on antidepressant drugs by a doctor. Still, the Court found that there was no severe distress because the distress did not interfere with the plaintiff's ability to

attend work or look for a new job. Id. at 750. Here, Plaintiffs offer no evidence of any emotional distress comparable to the distress suffered by the plaintiff in Bryant, which itself was legally insufficient. There is also no evidence that any of the Plaintiffs were unable to perform their duties at work due to emotional distress.

D.

Maryland does not recognize an independent claim for negligent infliction of emotional distress. n32 See Miller v. Bristol-Myers Squibb Co., 121 F. Supp. 2d 831, 839 (D. Md. 2000); Lapides v. Trabbic, 134 Md. App. 51, 758 A.2d 1114, 1122 (Md. Ct. Spec. App. 2000). Accordingly, I will grant summary judgment on these claims as well.

E.

Finally, the defendants move for summary judgment on Plaintiffs' claims for breach of contract and wrongful termination. n33 First, I will address the breach of contract claims. Only parties to a contract can enforce that contract and they may only enforce it against parties to the contract. Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 322 (D. Md. 1983). Therefore, there must be a contract between the parties for there to be a breach. Plaintiffs have produced no evidence that there was a contract between any of the Plaintiffs and any defendant other than the collective bargaining agreement. n34 Accordingly, there is no possible claim for breach of contract.

Second, when stating a claim for abusive discharge, Plaintiffs must show that their terminations contravened a clear mandate of public policy. See Jones v. Giant Food, Inc., 2000 WL 1828283, at *3 (D. Md. 2000); Orci v. Insituform E., Inc., 901 F. Supp. 978, 982 (D.Md. 1995);

Chappell v. S. Md. Hosp., Inc., 320 Md. 483, 578 A.2d 766, 768-71 (Md. 1990). The purpose of the tort of abusive discharge is to vindicate a public policy in the absence of any civil remedy. See Jones, 2000 WL 1828283 at *3. "Preclusion [of an abusive discharge claim] . . . applies only when the public policy sought to be vindicated is expressed in a statute which carries its own remedy for vindicating that public policy." Insignia Residential Corp. v. Ashton, 359 Md. 560, 755 A.2d 1080, 1086 (Md. 2000); see also Makovi v. Sherwin-Williams Co., 316 Md. 603, 561 A.2d 179, 182 (Md. 1989) (holding that there was no valid wrongful discharge claim where Title VII and Article 49B specifically provided remedies for the alleged public policy violation).

Abusive discharge suits for employment discrimination are generally precluded because federal and Maryland anti-discrimination laws create a civil remedy to vindicate discrimination in employment settings. Jones, 2000 WL 1828283, at *3; Makovi, 561 A.2d at 182. The Court in Insignia clarified the type of situation in which an abusive discharge claim will be allowed. Thus, an employee was fired for refusing to have sex with her employer under circumstances that would have amounted to prostitution. The Court in Insignia held that a wrongful discharge claim was not precluded because Maryland's anti-prostitution statute created a clear public policy, but did not create a private cause of action. See Jones, 2000 WL 1828283, at *3; Insignia, 755 A.2d at 1086; see also Watson v. Peoples Sec. Life Ins. Co., 322 Md. 467, 588 A.2d 760, 769 (Md. 1991) (allowing wrongful discharge claim to go forward where an employee was terminated following the initiation of a suit against her employer in which she alleged a co-worker had sexually harassed her and assaulted and battered her).

Plaintiffs have alleged that they were discharged for exercising their First Amendment rights to free speech and that under the reasoning of Insignia their claim is valid. However, the only sort of speech alleged here, filing charges with the EEOC, is specifically protected by Title VII. Therefore, Makovi, not Insignia, is controlling.

VI.

Plaintiffs have also asserted a claim against the individual defendants under 42 U.S.C. § 1981. I have previously dismissed that claim against one of the defendants, Tom Maynard. n35 The individual defendants have now moved for summary judgment on the section 1981 claim against them.

Directors or managers can be held personally liable when they "intentionally cause a corporation to infringe the rights secured by" section 1981. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1145 (4th Cir. 1975); see also Shirkey v. Eastwind Cmty. Dev. Corp., 941 F. Supp. 567, 572 (D. Md. 1996) (requiring intentional discrimination in order to establish a section 1981 violation), modified on other grounds, 993 F. Supp. 370 (D. Md. 1998). Here, Plaintiffs have only alleged that the individual defendants were aware of racial problems and graffiti in the workplace after they occurred and did not respond properly. There is no evidence that any of the individual defendants directed, participated in or even approved of intentional discrimination. Since there is no direct or circumstantial evidence of intentional discrimination, I will grant summary judgment on the section 1981 claims against the individual defendants.

VII.

I will now address the remaining claim of Plaintiff Gregory Carson against Giant. This claim is for disparate treatment under 42 U.S.C. § 1981 in connection with a

suspension that was imposed upon him in September 1994.

A.

Carson was hired by Giant as a vacation relief worker at Giant's Landover, Maryland warehouse in August 1985. Carson was hired into a permanent position as a dockman in the Landover warehouse in November 1985. In 1990, Carson moved to the salvage department at Giant's Jessup, Maryland warehouse, where he is still employed. Throughout his employment at Giant, Carson has been a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 922 ("Local 922").

On September 24, 1994, Carson, while on the warehouse floor, pushed a cart towards a co-worker. Another employee, Tyrone Mundell, was operating a powered hand jack and ran the jack into the cart. Mundell then purposely fell backwards off the jack and pretended to be injured. Supervisor Jake Guthridge saw Mundell and, believing that Carson had caused the accident and injury to Mundell, ran to Carson and proceeded to scream at him. (See Carson Dep. at 199-200.) In response, Carson became angry and argued with Guthridge about what had transpired. n36

As a result of this incident, Maria Myers, the general manager of the warehouse, suspended Carson for insubordination pending an investigation. Following that investigation and a grievance hearing on October 3, 1994, Carson was reinstated on the condition he undergo a drug test. According to Giant, the purpose of this drug test was to determine if Carson was using steroids since he had reportedly acted violently. (Myers Dep. at 55-56.) Carson agreed to this condition and returned to work. The result of the drug test was negative.

B.

"As a general matter, to make out a prima facie case for employment discrimination, the Plaintiff must show that: (1) he is a member of a protected group; (2) he earned satisfactory performance marks; (3) he suffered an adverse employment action; and (4) other similarly situated employees outside his protected class were treated more favorably." McCain v. Waste Mgmt. Co., 115 F. Supp. 2d 568, 573-74 (D.Md. 2000) (citations omitted).

Only the fourth of the elements is disputed. Giant states that Carson screamed and cursed at Guthridge, refused a directive to leave the warehouse floor and report to the office, kicked over several empty milk crates and approached Guthridge with clenched fists. Carson argues that he never screamed or cursed and never approached Guthridge with clenched fists. There is thus a factual dispute concerning what actually occurred during the confrontation between Carson and Guthridge and it is, therefore, unclear how to define "similarly situated employees." However, this dispute is not material because even if Carson could establish a prima facie case, he cannot establish pretext as discussed below.

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence that the plaintiff was suspended for a legitimate, nondiscriminatory reason. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

> If the employer meets this burden, the presumption of discrimination is eliminated, and the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the employer's nondiscriminatory

> reasons are pretextual and that the adverse employment action was actually taken because of the employee's race or national origin.

Obi v. Anne Arundel County, 142 F. Supp. 2d 655, 660, (D. Md. 2001). Giant has articulated a legitimate, nondiscriminatory reason for suspending Carson: Giant believed that Carson had verbally and physically threatened his manager. (See Myers Dep. at 55-56, 61-62.) Carson is unable to establish that this is a pretext for discrimination.

Carson argues that Giant has "trumped up" this explanation simply for the purpose of this litigation. The final decision to suspend Carson was made by Maria Myers, general manager of the Landover warehouse, based on her evaluation of the confrontation and her discussions with Guthridge. (See Carson Mem. Def. Ex. C.) Although Carson disagrees with Myers' decision and with Guthridge's version of the confrontation, he presents no evidence that Myers did not actually believe Guthridge. "While reviewing the employer's articulated reasons for discharge and the plaintiff's refutation thereof, we must keep in mind that 'Title VII is not a vehicle for substituting the judgment of a court for that of the employer.'" DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998) (quoting Jiminez v. Mary Washington College, 57 F.3d 369, 377 (4th Cir. 1995)). "When an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." Id.; see also Hawkins v. Pepsico Inc., 203 F.3d 274, 279 (4th Cir. 2000) (finding no pretext where the terminated plaintiff disagreed with her employer's evaluation of her work performance). n37

Since Plaintiff is unable to present any evidence that Myers' decision was no the true reason for Carson's suspension, there is no showing of pretext. n38 Accordingly, summary judgment is granted on Plaintiff's § 1981 claim concerning his suspension.

A separate order is attached.

Date: 2/20/02

J. Frederick Motz

United States District Judge

Footnotes

n1 As I did in related litigation instituted against Giant by other plaintiffs represented by plaintiffs' counsel in this action, Muhammad v. Giant Food, Inc., 2000 U.S. Dist. LEXIS 21949, Civil No. JFM-98-3565, I am directing the Clerk to open nine different cases for the plaintiffs other than Gregory Carson, the named plaintiff in this action. (Plaintiffs Dallas and Jones filed suit together.) I am doing so because, as the litigation has turned out, it constitutes ten separate employment discrimination actions that have taken substantial time to decide. Therefore, the court should be given credit for the different cases under the work measurement criteria used to determine the resources allocated to individual district courts. Plaintiffs' counsel objected to this administrative action in the Muhammad litigation. Although I had not meant to affect the rights of plaintiffs, in retrospect it may be that by opening separate cases, I unintentionally imposed upon plaintiffs the obligation of paying separate filing fees on appeal. To prevent that from happening here, my accompanying order directs that in the event of an appeal by more than one plaintiff, all of the cases should be consolidated and only one filing fee be paid.

n2 On February 6, 2002, after all papers had been filed and oral argument conducted, Plaintiffs' counsel filed a supplemental memorandum in support of motion for class certification in which she changed the definitions of the proposed subclasses. This supplemental memorandum was not filed in a timely manner and will not be addressed. I do note, however, that although the amended proposed subclasses appear to present less problems than the original subclasses, the same analysis would apply and the amended proposed subclasses would also fail.

n3 Plaintiffs Blocker, Carson, Connor, Ingram, Mathews, Newman and Skipper would represent this subclass.

n4 Plaintiffs Dallas and Jones would represent this subclass.

n5 Plaintiffs seek to represent class members whose experience was entirely different from their own. For example, they contend that African Americans who were denied employment because of discrimination in Giant's hiring practices should be included in the classes they represent although none of them were discriminated against during the hiring process. Such an "across-the-board" class is not certifiable. See E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977); Adams v. Bethlehem Steel Corp., 736 F.2d 992, 994 (4th Cir. 1984); Hill v. W. Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979).

n6 It is substantially less clear that the second proposed subclass would meet the numerosity requirement. Plaintiffs assert that Giant has rejected 800 African-American vacation relief workers for permanent positions. The exhibits cited by Plaintiffs to support this contention make no reference to vacation relief workers or the number "800." Plaintiffs present virtually no

evidence concerning vacation relief workers other than Plaintiffs Dallas and Jones. Plaintiffs do point to several affiants who allegedly experienced the same problems as Dallas and Jones. However, only Charles Guion alleges that he was denied a position improperly under a seniority system. Based on this record, I can only assume that three former African-American vacation relief workers, Dallas, Jones, and Guion, were denied permanent positions given to less senior white vacation relief workers. Clearly, three individuals is not enough to certify a class.

n7 Plaintiffs' claims concerning a hostile work environment and the failure to hire vacation relief workers for permanent employment present a somewhat closer question on commonality and typicality. However, as discussed in the text, infra, "rigorous analysis," see Gen. Tel. Co., 457 U.S. at 161, reveals that despite the superficial similarity, the hostile work environment claims of the different plaintiffs vary substantially from one another. Likewise, since the summary judgment record establishes that Giant based its decisions whether to hire vacation relief workers for permanent employment on the basis of their performance, those claims too fail to meet the commonality and typicality requirements. In any event, all proposed classes fail under the adequacy of representation element of Rule 23(a).

n8 Plaintiffs have provided statistical evidence in an attempt to prove general discrimination. However, the statistics are not separated by facilities or departments. Plaintiffs' expert, Harriet Zellner, tested for overall discrimination at Giant stores and warehouses. Additionally, as shown in Tables 8 and 10 of Plaintiffs' report, Zellner tested for discrimination at all warehousing facilities, all recycling facilities and all manufacturing facilities. (See Pl. Ex. 3.) This control for

work environment is not specific enough. See Stastny, 628 F.2d at 278-79 (rejecting statistical evidence because the statistics were not probative of separate facilities, but only showed overall disparities); Abram v. United Parcel Serv. Of Am., Inc., 200 F.R.D. 424, 431 (E.D. Wis. 2001) (stating that aggregate statistical evidence "masks differences from district to district and from supervisor to supervisor that preclude a finding of 'commonality'").

n9 I declined to reach this question in the related Muhammad litigation, now pending in the Fourth Circuit, in which counsel for Plaintiffs in this litigation sought to represent a class. I chose not to do so (and was prepared to decline to reach the issue again here) to avoid commenting upon the performance of Plaintiffs' counsel unnecessarily. However, during oral argument, Plaintiffs' counsel suggested that because I did not reach the question in Muhammad, Giant was collaterally estopped from raising the issue again. Under these circumstances I have reluctantly concluded that, lest my silence be misinterpreted, I must address the question.

n10 "Under Title VII and . . . Section 1981, the elements of the required prima facie case are the same." Gairola v. Com. of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985).

n11 The plaintiffs filed EEOC complaints on different dates. Each plaintiff's Title VII claims includes events dating back 300 days from the specific date he filed his EEOC complaint.

n12 I note that allegations by Plaintiffs Skipper and Ingram of a continuing pattern of racist graffiti in the trailers may constitute a serial violation because the alleged graffiti was not sporadic. However, as discussed below, the allegations of graffiti are not sufficient to establish a hostile work environment. Considering the

graffiti over a longer period of time does not alter that determination.

n13 Five plaintiffs refer to a noose in their pleadings. Carson refers to the Jessup noose. He heard about the noose second-hand and, therefore, its effect on his claim is minimal. Connor also refers to the Jessup noose, but notes that he simply kept cleaning after he saw it. Skipper and Ingram refer to all three nooses in the Landover warehouse. The 1991 noose incident is time-barred. The 1995 and 1996 noose incidents are not time-barred, but the plaintiffs fail to allege who placed the nooses, whether they complained about the nooses and whether management removed the nooses in a timely manner. Therefore, they have failed to present any evidence that would establish Giant's liability. Finally, Mathews states that he saw two nooses, but he provides insufficient details and no dates. Thus, he has not demonstrated either that the incidents occurred during the relevant time period or that Giant can be held liable for them.

n14 Carson states that Majors made numerous racially offensive jokes daily, but there are no details surrounding other jokes.

n15 Three or four African-American employees had lockers in the more desirable, larger locker room. (See Carson Dep. at 173.)

n16 Skipper also stated on deposition that on approximately twelve other occasions African-American co-workers called him "nigger." However, he further testified that the use of the word "nigger" by African-Americans was not offensive to him.

n17 Skipper also claims to have seen a picture of a monkey, ape, and bear with the caption "just blacks" on a bulletin board in 1997 or 1998. Under Fed. R. Civ. P. 15(d), a plaintiff must move the court for leave to file a

supplemental pleading setting forth occurrences which happened after the date of the amended complaint. See Young-Henderson v. Spartanburg Area Mental Health Ctr., 945 F.2d 770, 775 (4th Cir. 1991). Since Skipper has not filed a supplemental pleading, this incident is not considered part of his hostile work environment claim.

n18 Ingram also makes allegations about several separate incidents that occurred prior to 1993, including ones where (1) a co-worker referred to African-American employees as "niggers," (2) a manager called a black employee a "black monkey," and (3) Ingram heard a manager state that white employees were better selectors than black employees. To the extent that Ingram seeks to state independent claims based upon these allegations, the claims are time-barred. Moreover, while extremely disturbing, the incidents were sporadic and, although evidence of them would perhaps be admissible under Rule 404, they were not sufficiently pervasive to establish a hostile work environment when considered in connection with incidents that later occurred.

n19 Connor does not present any specific evidence of the dates concerning three other allegations he makes: that a manager harassed him in the bathroom, that he was assigned pallet duty alone, and that he was called a monkey by a co-worker.

n20 Mathews also alleges that in the mid-1980s the word "nigger" was written all over his locker and that in 1989 Giant allegedly refused to take him to the hospital. Like Ingram's allegations relating to pre-1993 incidents, see supra n. 18, these allegations neither give rise to independently actionable claims nor constitute sufficient background evidence to render Mathews' graffiti allegations actionable as a hostile work environment claim.

n21 On one occasion, an employee drew a picture in the bathroom of Qualls with sexually offensive content and the words "Kirby the tire man" written under the picture. Somewhere between 1994 and 1996, someone wrote a derogatory remark concerning Qualls next to his name on a union decal in the workplace. On another occasion, an employee wrote a sexually explicit reference to Qualls and his family in the downstairs bathroom. The only instance of racist graffiti involving Qualls is time-barred.

n22 Summary judgment will be, however, granted on Carson's hostile work environment claim under Title VII because most of the alleged instances of harassment occurred prior to the 300 day reporting requirement under Title VII. The incidents that clearly took place during the 300 days are the posting of monkey pictures, the incident where Carson was not picked up by a van, Carson's assignment to the smaller locker room and Carson's manager screaming at him for being late. These incidents are not alone sufficient to establish severe and pervasive harassment.

n23 Skipper alleges that his manager followed him around the warehouse and announced his productivity over a loudspeaker. Ingram also alleges that his productivity was announced over a loudspeaker. There is no evidence that these incidents were based on race. This is not unique to Skipper and Ingram. Throughout Plaintiffs' papers, Plaintiffs' counsel asserts numerous incidents that nothing in the record establishes as being connected to race. For example, Carson alleges that he could not listen to the radio stations he desired and could not play on the company softball team. Because of the lack of evidence tying such incidents to race, they cannot be considered as establishing a legally actionable hostile work environment.

n24 I decline to find Giant liable for the alleged use by Skipper's white co-workers of the racist epithet "nigger" approximately thirteen times during the four years prior to this lawsuit. Skipper has stated that he was unable to recall the names of any of his white co-workers who used the term, and he could not offer any specifics of the incidents. (Skipper Dep. at 248.) General allegations lacking in dates, times, and circumstances are without the particularity required to support a claim of racial harassment. See Carter v. Ball, 33 F.3d 450, 461-62 (4th Cir. 1994) (holding that "general allegations do not suffice to establish an actionable claim of harassment"); Fisher v. Maryland Dep't of Hous. & Cmty. Dev., 32 F. Supp. 2d 257, 262 (D. Md. 1998), aff'd 166 F.3d 1208 (4th Cir. 1998). Further, Skipper acknowledges that he did not complain to managers or file a complaint with Giant's Fair Employment Office ("FEO") when the incidents occurred, although he complained to the FEO after this lawsuit was filed. (Skipper Dep. at 248-49.)

n25 This is not to say that an employer must not be alert to the existence of racist (or sexually harassing) graffiti and take steps to remove or paint over it when it appears. The record establishes that Giant is now doing so. If it did not, I would entertain a motion for injunctive relief.

n26 Mungro claims that his manager made a racially offensive comment to him. It is an isolated incident that does not constitute a hostile work environment. Mungro also claims other drivers made racially offensive comments over the CB radio. These incidents are not sufficiently particularized, as to the dates, frequency and circumstances in which they occurred, to determine whether they occurred during the relevant time period or whether there is any basis to hold Giant liable for the harassment. See Carter, 33 F.3d at 461-62.

n27 Both white and African-American employees had their tires slashed. Additionally, all four tire-slashing incidents occurred at Qualls' home. Following the tire slashing in August 1996, Qualls discovered that William Donahue, a co-worker, was the perpetrator. Giant fired Donahue when it was notified of the incident.

n28 The Fourth Circuit noted that "although Ellerth and Faragher each specifically dealt with claims of sexual harassment, the developing consensus is that the holdings therein apply with equal force to other types of harassment claims under Title VII." Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 n.9 (4th Cir. 2001).

n29 Carson even stated: "I complained all the time. I complained about every damn thing. Excuse me, I complained every day." (Carson Dep. at 286.) Giant argues that Carson's deposition testimony is self-serving. However, at summary judgment, the court's role is not to weigh testimony. Carson asserts more than general complaints. He testifies about complaints he made to specific individuals and, several times, he provides specific dates.

n30 The seven individual defendants are Pete Manos, Sam Thurston, Maria Myers, Robert Haywood, Deborah Lilly, Chris Balodemas and Tom Maynard.

n31 Plaintiffs rely upon Molesworth v. Brandon, 341 Md. 621, 672 A.2d 608 (Md. 1996), for the proposition that Article 49B creates a cause of action for an improper discharge where that discharge is the result of discrimination condemned by section 14 of Article 49. This interpretation of Molesworth is inaccurate. In Molesworth, the Court determined that section 14 supports a common law claim of wrongful discharge against an employer exempted as a small business under Art. 49B, § 15(b). 341 Md. at 637. Giant is not a small business exempted under section 15(b).

n32 Plaintiff relies on Hamilton v. Ford Motor Credit Co., 66 Md. App. 46, 502 A.2d 1057 (Md. Ct. Spec. App. 1986), for the proposition that one can assert a claim for negligent infliction of emotional distress. However, the Court in Hamilton clearly states that there is no recovery in Maryland for negligent infliction of emotional distress. 502 A.2d at 1065-66. The Court in Hamilton simply points out that under a claim of intentional infliction of emotional distress, the tort need not be intentional in all circumstances; an actor can be liable for emotional distress if the injury is inflicted by extreme and outrageous recklessness. Id. at 1066.

n33 I will also refer to the claim of "wrongful termination" as a claim for "abusive discharge" or "wrongful discharge."

n34 As Defendants point out, if the Plaintiffs were asserting a breach of their collective bargaining agreements, these claims would also be barred as a matter of law. Claims regarding the interpretation and application of collective bargaining agreements are governed solely by Section 301 of the Labor Management Relation Act, 29 U.S.C. § 185 ("LMRA"). See United Steelworkers v. Rawson, 495 U.S. 362, 368, 109 L. Ed. 2d 362, 110 S. Ct. 1904 (1990); Jones v. Giant Foods, Inc., 2000 U.S. Dist. LEXIS 21813, 2000 WL 1835393, at *5 (D. Md. 2000).

n35 I also previously dismissed a series of other claims against all individual defendants, including claims under section 1985, section 1986, the Equal Pay Act, Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. See Carson v. Giant Food Inc., Civil No. JFM-96-2882, slip op. (D. Md. Aug. 7, 1997).

n36 The parties dispute the details surrounding Carson's reaction towards Guthridge. Giant asserts that

Carson screamed and cursed at Guthridge, refused a directive to leave the warehouse floor and report to the office, kicked over several empty milk crates and approached Guthridge with clenched fists. Carson argues that he never raised his voice at Guthridge, never cursed at Guthridge and never approached Guthridge with a clenched fist. Carson also asserts that another white employee struck Carson's leg with a dairy cart while Carson was arguing with Guthridge, and that this other employee was never disciplined. As discussed below, this factual dispute is not a material one.

n37 Plaintiff also argues that requiring him to take a drug test for steroids demonstrates pretext because there was no indication he had used drugs. However, testing Plaintiff for steroid use was consistent with Myers' belief that he had acted violently.

n38 Plaintiff also argues that Giant made Carson sign a "last-chance letter" as a condition to his return to work in violation of Carson's union contract. Plaintiff presents no evidence that this was actually in violation of the union contract. Plaintiff also asserts that white employees were never forced to sign last-chance letters. However, Plaintiff's only evidence is his own testimony that he did not know of a white employee who signed a last-chance letter. (Carson Dep. at 221.) This mere speculation is not sufficient to establish pretext.

Civil Action No.: JFM-96-2882

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, et al.,
Plaintiffs

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion, it is, 20th day of February 2002

ORDERED

1. Plaintiffs' motion for class certification, preliminary injunctive relief and bifurcation of liability and damage trials is Denied;

2. Defendants' motions for summary judgment are Granted as to all claims of Plaintiff Carson, except Carson's hostile work environment claim against Giant under section 1981;

3. Defendant Giant's motion for summary judgment is Denied as to the hostile work environment claim under 42 U.S.C. § 1981 of Plaintiff Carson;

4. The Clerk is directed to open nine new cases in eight of which each of the plaintiffs in this action, other than Gregory Carson, John Dallas, Jr., and David Jones, is named as the plaintiffs; provided, however, that in the

event of an appeal by more than one plaintiff, the cases shall be consolidated and only one filing fee be paid.

J. Frederick Motz

United States District Judge

Civil Action No.: JFM-02-537

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILBERT SKIPPER, JR.,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For WILBERT SKIPPER, JR., plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, defendants: Kathleen L. Jennings, Kristin E. Adler, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., defendant: Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, interested party: Marc A. Stefan, Carey R. Butsavage, Butsavage and Associates, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff Wilbert Skipper, Jr., a warehouse worker for Giant Food, Inc., has filed suit against Giant n1 alleging racially disparate treatment and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, and adding related state law claims. Defendants now move for summary judgment as to all counts. The motion will be granted.

I.

Skipper began working as a vacation relief worker at Giant's Landover, Maryland, warehouse in 1990, filling in for permanent employees who were on vacation. (Skipper Dep. at 84.) In June of 1991, Giant hired him as a warehouseman for the non-food portion of the warehouse. (Id. at 84-85.) He held this position until 1994, when he became a selector in the produce department of the warehouse. (Id. at 85.) Skipper is still employed by Giant but has not worked since August 1998, when he sustained an injury and began receiving worker's compensation. (Id.)

Skipper, who is African American, alleges that Giant subjected him to racially discriminatory treatment when it disciplined him on several occasions, including on May 18, 1995. On that date, a manager told Skipper's

supervisor that he had observed Skipper outside of Skipper's work area. (Def.'s Mem. at 5-6.) Although Skipper contested this allegation, he received a written warning. (Id. at 6.) The warning expired six months later without any consequences because Skipper committed no infractions during the warning period. (Id. at 7.) Skipper alleges that Giant subjected him to harsher treatment than white workers on this occasion and others. The other instances of alleged disparate treatment that he cites include occasions when Giant managers followed him around the warehouse, subjected him to other charges of being outside his work area, announced his productivity over a loudspeaker, and failed to excuse an absence that he had to take due to a family emergency. (Pl.'s Opp'n at 2-3.)

Skipper filed a charge of discrimination with the Maryland Commission on Human Relations and the Equal Employment Opportunity Commission ("EEOC") on April 2, 1996. (Def.'s Mem. at 7.) He amended the charge on June 7, 1996. (Id. at 8.) The EEOC issued Skipper a right-to-sue letter on June 14, 1996, and this suit followed on September 12, 1996. (Id.)

II.

A.

Skipper alleges that he was subject to discriminatory discipline primarily because he was given a written warning on May 18, 1995, for being outside his work area. Giant argues that this claim is time barred, because it occurred more than 300 days prior to April 2, 1996, the date on which Skipper filed his charge of discrimination with the EEOC. Because this claim is time barred, and because other allegations by Plaintiff of disparate discipline do not constitute adverse employment

actions, I will grant Defendant's motion as to the disparate discipline claim.

Under Title VII, a plaintiff in a "deferral state," a state that has its own law prohibiting discrimination and an agency enforcing the law, has 300 days after the alleged act of discrimination to file a claim with the EEOC. See Nye v. Roberts, 159 F. Supp. 2d 207, 210 (D. Md. 2001). Since Maryland is a deferral state, Skipper's Title VII claims that occurred within 300 days of April 2, 1996 are timely for purposes of this suit. See Leskinen v. Utz Quality Foods, Inc., 30 F. Supp. 2d 530, 533 (D. Md. 1998). Three hundred days prior to April 2, 1996, is June 8, 1995. Therefore, incidents occurring prior to June 8, 1995, are not timely for purposes of this Title VII suit. Because Skipper's key incident of disparate discipline, the written warning for being outside his work area, occurred on May 18, 1995, it does not fall within the relevant time period for Title VII consideration.

Plaintiff responds that his disparate discipline claim is not limited to the May 18, 1995, written warning. (Pl.'s Opp'n at 5.) He urges the court to apply the continuing violation doctrine and to consider claims beyond the scope of the 300-day period. Among those claims, in addition to the May 18, 1995, warning, are the following: an incident in late 1995 when Skipper's manager, Bob Bennett, followed Skipper throughout the warehouse; an incident in which an assistant manager, Mike Franscoya, gave Skipper a warning for being outside his work area and announced Skipper's productivity level over the loudspeaker, which occurred sometime between 1996 and 1998; an incident in 1997 when a Giant executive, Eric Weiss, allegedly falsified an allegation that Skipper was outside his work area; and a six-month written warning Skipper received for having an unexcused absence as a result of a family emergency. (Id. at 6-7.)

Even assuming that all of the above examples may be considered in support of Plaintiff's disparate discipline claim, n2 they fail to meet a threshold requirement of Title VII: they do not qualify as adverse employment actions. Thus, Plaintiff is unable to make out a prima facie case of disparate discipline, which is necessary for this claim to survive a summary judgment motion.

That a plaintiff has suffered an adverse employment action is an "absolute precondition" to suit under the employment discrimination laws. Tuggle-Owens v. Shalala, 2000 WL 783071, at *8 (D. Md. 2000); see also Porter v. National Con-Serv, Inc., 51 F. Supp. 2d 656, 658 (D. Md. 1998), aff'd 173 F.3d 425 (4th Cir. 1999) (requiring proof of adverse employment action in case that involved, inter alia, claims of disparate disciplinary practices). The Fourth Circuit discussed what constitutes an adverse employment action in Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001). n3 An adverse employment action need not be an "ultimate employment decision," such as the termination of an employee from a job, but it must adversely affect "the terms, conditions, or benefits of employment. . . ." Id. at 865-66. As the Fourth Circuit noted in Von Gunten, "Terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from [an employer's] disciplinary procedures." Id. at 869.

Plaintiff here has alleged three types of action taken by his employer against him: surveillance, written warnings, and disclosure of his job performance (productivity) to others. He does not allege that, beyond his perception that they were unfair, any of these actions adversely affected a term, condition, or benefit of his employment, and courts have not typically held

such actions to satisfy this requirement. See, e.g., Von Gunten, 243 F.3d at 869 (finding that the following of an employee did not constitute an adverse employment action); Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745, 755 (4th Cir. 1996) (finding a formal disciplinary warning for conduct plaintiff denied, which was subsequently removed from his personnel file, not to constitute an adverse employment action); Porter, 51 F. Supp. 2d at 658 (holding allegation of improper discipline not actionable as an adverse employment action). n4 The warnings did not lead to any further disciplinary action, such as a suspension, nor to any consequence Plaintiff has identified. Similarly, the alleged surveillance and disclosure of his productivity did not lead to discipline of any form, not even a warning.

B.

Plaintiff's disparate discipline claim under § 1981, while not subject to the administrative exhaustion requirements of Title VII claims, involves the same elements of a prima facie case. See Gairola v. Virginia, 753 F.2d 1281, 1285 (4th Cir. 1985). Because I have found that none of the actions cited by Plaintiff – surveillance, written warnings, and disclosure of his productivity to others – can constitute an adverse employment action as a matter of law, his § 1981 claim also fails.

A separate order is attached.

Date: February 20, 2002

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Skipper has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Skipper's hostile environment claims under Title VII and section 1981 and state law claims against Giant, in addition to global arguments made by Skipper and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission and the viability of applying the continuing violation doctrine. Thus, this opinion focuses only on Skipper's disparate treatment claims under Title VII and section 1981.

n2 Plaintiff acknowledged in his deposition that all but the first incident above (involving Bennett) occurred after he filed this lawsuit. (Skipper Dep. at 184, 189, 216, 225.) Under Fed. R. Civ. P. 15(d), a plaintiff must move the court for leave to file a supplemental pleading setting forth occurrences which happened after the date of the amended complaint. See Young-Henderson v. Spartanburg Area Mental Health Ctr., 945 F.2d 770, 775 (4th Cir. 1991) ("As a general rule, facts accruing after the suit is brought may not be inserted by way of amendment but must be added by supplemental pleading."). Therefore, all alleged discriminatory acts occurring after October 11, 1996, the date the amended complaint was filed, could not be brought as Title VII or § 1981 claims because there has been no supplemental pleading.

n3 Although Von Gunten involved a Title VII retaliation claim, the court explained that the same principles apply to Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2. 243 F.3d at 864. The court noted that "'conformity between the provisions of

Title VII is to be preferred.'" Id. (quoting Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).

n4 Keenan v. American Cast Iron Pipe Co., 707 F.2d 1274 (11th Cir. 1983), cited by Plaintiff, is not to the contrary. In Keenan, the Eleventh Circuit found that a reprimand "that has a meaningful adverse effect on an employee's working conditions" could constitute an adverse employment action under Title VII. Id. at 1277. Unlike the written warnings in this case, however, the reprimand in Keenan could not be expunged from the employee's file, and the court found that it could affect his ability to secure promotions and credit. Id.

Civil Action No.: JFM-02-537

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILBERT SKIPPER, JR.,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

Civil Action No.: JFM-02-538

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELVYN CONNOR,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For MELVYN CONNORS, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff Melvyn Connor has instituted this action against Giant Food, Inc. ("Giant") n1 alleging racially disparate treatment and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, discrimination under the Age Discrimination in Employment Act ("ADEA"), quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful termination and breach of contract. Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

Melvyn Connor was hired by Giant as a vacation relief worker at Giant's Jessup, Maryland warehouse in April 1984. n2 Connor was hired into a permanent position as a dockman in the Jessup warehouse in October 1984. Connor was in his late-40s at the time he was hired. Throughout his employment at Giant, Connor has been a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 922 ("Local 922").

On August 9, 1995 Connor was terminated. A series of events led to his termination. On February 18, 1993, Connor received a disciplinary notice for "insubordination, threats, coercion, [and] intimidation." (Disciplinary Notice, Def. Ex. C.) n3 The notice, which Connor refused to sign, stated that future misconduct "will result in further disciplinary action, suspension or

termination." (Id.) On July 6, 1995, Connor filed a union grievance against his manager, Mike Majors, for allegedly not assigning him overtime hours. On July 26, 1995, Majors was supervising Connor when a confrontation occurred. The parties dispute the details surrounding this confrontation. Giant alleges that Majors questioned Connor because he was not following instructions. In response, Connor then pushed a dolly of milk containers into Majors. Connor then went into a tirade calling Majors a "dumb fuck," a "stupid bastard," and telling Majors that "if you [Majors] don't stop talking to me [Plaintiff Connor], I'm going to do my best to kill you and lose my job." Connor also stated that he was 58 years old and that Majors "could not take what he could give out." Connor allegedly made these threatening comments while holding a shovel. (Def. Mem. at 4.) Connor denies making any threat. (Pl. Opp. at 15.) As discussed below, this factual dispute does not materially affect the outcome of this motion.

Connor was immediately suspended pending investigation. (See Garrett Decl. at 2, Def. Ex. B.) Several grievance hearings were held involving Connor, Majors, Connor's shop steward, union representatives and Giant management. Following these hearings, Maria Myers, general manager of the Jessup warehouse, terminated Connor. (See Myers Decl. at P 4; Letter from Myers to Connor, Def. Ex. B.) Following his termination, Connor sought unemployment benefits, but was denied because his alleged misconduct led to his termination. (See Unemployment Insurance Appeals Decision, Def. Ex. 6.) Connor appealed the decision and lost. Id.

II.

A.

To establish a prima facie case of discriminatory termination, Connor must show that "(1) [he] is a

member of a protected class; (2)[he] was qualified for [his] job and [his] job performance was satisfactory; (3)[he] was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." Porter v. National Con-Serv, Inc., 51 F. Supp. 2d 656, 659 (D. Md. 1998) (citing Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995)); see also Karpel v. Inova Health System Serv., 134 F.3d 1222, 1228 (4th Cir.1998). If the plaintiff establishes a prima facie case, the burden shifts to the employer to advance a legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If the employer successfully proffers such an explanation, the burden returns to the plaintiff to show that the proffered reason is a pretext for impermissible discrimination. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The first and third elements of a prima facie case are undisputed. Connor is African-American and he was fired.

The second and fourth elements of a prima facie case of discriminatory termination are disputed. n4 However, even assuming Connor could establish these elements, the termination of Connor was not discriminatory because Giant has set forth a legitimate, nondiscriminatory explanation for the termination and Connor is unable to establish pretext. Giant believed that Connor had verbally and physically threatened his manager. (See Termination Notice, Def. Ex. 5; Garret Decl., Def. Ex. B; Myers Decl. at P 4; Letter from Myers to Connor, Def. Ex. B.) "While reviewing the employer's articulated reasons for discharge and the plaintiff's refutation thereof, we must keep in mind that 'Title VII is not a vehicle for substituting the judgment of a court for that of the employer.'" DeJarnette v. Corning Inc.,

133 F.3d 293, 299 (4th Cir. 1998) (quoting Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995)).

Connor simply presents no evidence that this explanation is false. The final decision to terminate Connor was made at a grievance hearing consisting of Connor, union representatives, and Giant management. Following the meeting, Giant management believed that Connor screamed and insulted Majors, threatened to kill Majors and made this threat while holding a shovel. (See Garrett Decl., Def. Ex. B.) Although Connor disagrees with this decision, he presents no evidence that Giant did not actually believe the threats had taken place. "When an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." DeJarnette, 133 F.3d at 299; see also Hawkins v. Pepsico, Inc., 203 F.3d 274, 279, (4th Cir. 2000) (finding no pretext where the terminated plaintiff disagreed with her employer's evaluation of her work performance).

Plaintiff argues that Giant could not terminate Connor because there was an ineffective warning notice. Connor contends that the warning notice he received following the 1993 confrontation was invalid in 1995 and could not serve as a basis for terminating Connor. (See Pl. Opp. at 29-31.) Connor presents no evidence that Giant relied on the warning notice when firing Connor. In fact, the union contract provides that "the employer shall have the right to discharge or suspend any employee for good cause." (See Union Local 922 Contract at 7, Pl. Ex. 5.) Connor is unable to present any evidence that Giant's decision was not the true reason for Connor's termination. Thus, there is no showing of pretext. Accordingly, summary judgment is

granted on Plaintiff's Title VII claim concerning his termination.

B.

Giant next argues that it is entitled to summary judgment on Plaintiff's § 1981 claim. The same elements of a prima facie case are required for § 1981 as for Title VII. See Gairola v. Virginia, 753 F.2d 1281, 1285 (4th Cir. 1985). Because I have found no discrimination under Title VII, Plaintiff's § 1981 claim fails as a matter of law. See Causey v. Balog, 162 F.3d 795, 804 (4th Cir. Md. 1998). Defendant's motion as to Plaintiff's § 1981 claim will be granted.

III.

Giant argues that it is entitled to summary judgment on Plaintiff's claim of discriminatory discharge under the Age Discrimination in Employment Act ("ADEA"). Plaintiff does not oppose Giant's argument in his opposition. To establish a prima facie under the ADEA a plaintiff must establish "that (1) the employee was a member of the protected group, i.e., over the age of 40; (2) he suffered an adverse employment action; (3) he was at the time meeting his employer's legitimate expectations; and (4) he was replaced by someone substantially younger or outside the protected group." Moore v. Board of Educ. for Talbott County, 63 F. Supp. 2d 667, 671 (D. Md. 1999) (citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996). The first two elements are undisputed. Connor was over the age of 40 when he was terminated from Giant and he was terminated from his position at Giant.

Connor is unable to establish that someone substantially younger took his position. Connor states that Robert McClure took his position and cites to the affidavit of Tyrone Mundell and a locker assignment list

in support of this argument. (See Pl. Opp. at 23.) However, the locker assignment list does not include the names of McClure or Connor and thus, provides no support for Connor's argument. Additionally, Mundell states that Thomas McClure replaced Connor, but Plaintiff provides no other evidence that Robert McClure replaced him. Additionally, Robert McClure was made a permanent employee on the same day as Connor in 1984. (See Connor Dep. at 77-78.) Therefore, McClure was already working at Giant and seemingly could not have replaced Connor. More importantly, even if Connor could establish a prima facie case, he cannot show that Giant's legitimate, nondiscriminatory reason for terminating Connor was pretextual for the same reasons as he could not show pretext under Title VII. Accordingly, summary judgment is granted on Plaintiff's claim of discriminatory discharge under the ADEA.

A separate order is attached.

Date: 2/20/02

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Connor has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Connor's hostile work environment claims under Title VII and section 1981 and state law claims against Giant, in addition to global arguments made by Connor and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity

Commission and the viability of applying the continuing violation doctrine. Thus, this opinion focuses only on Connor's disparate treatment claims under Title VII and section 1981 and his ADEA claim.

n2 Vacation relief workers are part-time workers hired for up to one year to replace vacationing permanent workers. (See Giant Mem. at 1.)

n3 The events surrounding issuance of this notice are in dispute. Giant states that Connor was called into the office of his manager, Karl Vollmerhausen, to discuss his uncooperative behavior. According to Giant, Connor became belligerent and told Vollmerhausen that "he may not be able to do anything while he was on Giant property, but once gone from here anything could happen." Connor also allegedly said that "when he got home he was going to pray for his wife because he was probably going to wind up in the penitentiary." Connor denies making any threat to Vollmerhausen. As discussed below, this factual dispute does not materially affect the outcome of this motion.

n4 These elements are in dispute because the parties dispute the events surrounding the incident with Majors that ultimately led to Connor's termination. If I were to accept Giant's explanation of the events, Connor could not establish that his performance was satisfactory or that Giant retained other employees in similar circumstances. However, since evidence is to be viewed in the light most favorable to the non-moving party, I will not decide which party's version of the incident with Majors is more accurate. I do note that Connor has presented no evidence that he did not threaten or yell at Majors other than his own bare denials. See Demesme v. Montgomery County Gov't, 63 F. Supp. 2d 678, 683 (D. Md. 1999) (finding that the satisfactory performance element of a prima facie case was not met where "plaintiff disputed the defendants' versions of the events

resulting is disciplinary proceedings, [but] he had offered no evidence beyond his own bare denials"). As discussed below, even if Connor could establish a prima facie case, the termination was not discriminatory.

Civil Action No.: JFM-02-538

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELVYN CONNOR,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

Civil Action No.: JFM-02-539

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM INGRAM,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For WILLIAM INGRAM, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff William Ingram, a former warehouse worker for Giant Food, Inc., has filed suit against Giant n1 alleging racially disparate treatment, a hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, and adding related state law claims. Defendants now move for summary judgment as to all counts. The motion will be granted.

I.

Ingram was hired by Giant in May 1989 as a produce selector at its Landover, Maryland, warehouse. (Def.'s Mem. at 1.) As a selector, Ingram would select and prepare produce for shipment to Giant supermarkets. (Id.) Ingram held this job for nearly seven years, until he was discharged by Giant in 1996 for allegedly falsifying a medical record and accruing numerous unexcused absences. (Id. at 2.)

According to Giant, Ingram's job performance suffered significantly beginning in 1993, when he was warned repeatedly about low productivity. (Id.) Beginning in late 1994, Giant states that Ingram also was warned repeatedly about taking unexcused sick leave, including three days in 1994 and 16 days in 1995. (Id. at 3-5.) Ingram received separate three-day suspensions for both alleged problems. (Id. at 3.)

In March 1996, after he had been absent from work for nearly two weeks on sick leave that Giant had not approved, Ingram presented Giant with a required medical certification form. (Id. at 5.) The form stated

that Ingram had been ill with the flu and had been treated by Dr. Arnaldo D. Garro. (Id.) When Giant sought to verify the information on the form, it alleges that it learned that Ingram had not been treated by Dr. Garro and that the signature appearing on the form was not Dr. Garro's. (Id. at 5-6.) Giant discharged Ingram n2 for excessive absenteeism and violating a company policy on honesty. (Id. at 6.)

Ingram filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 2, 1996, amending the charge on June 21, 1996. (Id.) The EEOC issued him a right-to-sue letter on June 28, 1996, and Ingram commenced this suit on September 12, 1996. (Id.) Ingram, who is African-American, contends that white employees were not disciplined and fired as he was, despite committing similar infractions. n3

II.

Ingram alleges that he was subjected to disparate treatment regarding Giant's sick leave policy, disciplinary policy, and workload requirements. He also contends he was fired in retaliation for filing a race discrimination charge with the EEOC. The merits of those two claims under Title VII are discussed in turn below.

A.

Plaintiff first claims that he was subject to disparate treatment under Title VII. n4 To establish a claim under Title VII, Plaintiff must offer direct evidence of discriminatory intent on the part of the defendant or meet a three-part test for inference of discriminatory intent under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under the McDonnell Douglas scheme, a plaintiff alleging disparate treatment must first establish a prima

facie case. Settle v. Baltimore County, 34 F. Supp. 2d 969, 991 (D. Md. 1999). If plaintiff does so, the burden of production then shifts to the defendant to offer a "legitimate non-discriminatory reason for its actions." Id. If defendant satisfies this burden, the burden of production shifts back to the plaintiff to demonstrate that defendant's proffered reason is a mere pretext, and that discrimination was the real reason for the discharge. See Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993).

Plaintiff in this case has not presented direct evidence of discriminatory intent on the part of Giant. Thus, his claim will be considered under the McDonnell Douglas scheme. To establish a prima facie case of disparate disciplinary practices, which is a type of disparate treatment claim, see Settle, 34 F. Supp. 2d at 991, a plaintiff must show "(1) that he is a member of the class protected by Title VII, (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against those other employees." Cook, 988 F.2d at 511; Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985). In order to carry the burden of his prima facie case, a plaintiff must compare "only discipline imposed for like offenses. . . ." Cook, 988 F.2d at 511.

Plaintiff received warning notices and a three-day suspension for low productivity and was suspended for excessive absenteeism. He was terminated for excessive absenteeism and his alleged submission of a false medical certification. He offers several examples in an effort to show the discipline he received was harsher than that given to white workers for similar offenses.

Plaintiff offers three examples of white workers were treated differently with regards to absenteeism:

Craig McNally, John Lowe, and John Owens. (Ingram Dep. at 75, 133.) McNally took unexcused sick leave for two days and then was allowed to get a medical certification after he had returned to work, according to Plaintiff. (Id. at 75-76.) Plaintiff contends this documentation was false, although he offers no proof of that assertion. (Id. at 131.) He asserts that Lowe and Owens each had three unexcused absences in three months. (Id. at 134.) They were disciplined but not fired, according to Ingram. (Id.)

As to dishonesty, Plaintiff cites as comparable cases a white manager, Robert Diecher, who was found to have falsified time cards for white employees and who was reassigned, not fired; n5 and a white employee, Robert Dedrick, who was given a last chance letter n6 after falsifying work-related documents. n7 (Pl.'s Opp'n at 10-11.) Robert Haywood, director of distribution at the Landover distribution center, acknowledged that Dedrick was given a last chance letter for "padding" a selection sheet, though he was ultimately discharged. (Haywood Dep. at 210-11.)

None of the above examples provide support for Plaintiff's assertion that white employees were treated differently than he was, because none of the above cases involve the same combination of offenses that Giant alleges Plaintiff committed: both excessive unexcused absenteeism (amounting to nearly two weeks in 1996 alone, not the two or three absences Plaintiff cites for McNally, Lowe, and Owens) and dishonesty in violation of company policy. Even if Dedrick's case were to prove comparable – which, lacking the excessive absenteeism component, it is not – Plaintiff has not presented evidence by which a reasonable jury could find he had established a case of disparate discipline. The Fourth Circuit has held that a single circumstance of allegedly dissimilar disciplinary

treatment, devoid of the context of disciplinary treatment "generally afforded by the employer for conduct similar to that of the plaintiff," is not sufficient to establish an inference of racial discrimination. n8 Cook, 988 F.2d at 512.

Plaintiff's citation to an expert report by Dr. Harriet Zellner does not buttress his case. Dr. Zellner, an economist and president of Integral Research Inc., prepared an economic analysis of race discrimination at Giant retail stores and in its distribution division. (Pl.'s Ex. Vol. 1.) Her findings as to the distribution division are of limited utility, however, because they do not provide a separate analysis for the Landover warehouse, where Plaintiff worked, or for the particular position of selector, which Plaintiff held. Further, Dr. Zellner analyzed discipline for the period 1994 to 1998, whereas Plaintiff was employed from 1989 to 1996. Finally, she does not provide detail on the type or level of offense for which the employees she studied were disciplined. While statistics can be highly relevant and "important proof" in an employment discrimination case, Carter, 33 F.3d at 456, "the usefulness of statistics depends on the surrounding facts and circumstances." Id. Here, because the statistics are unrelated to Plaintiff's particular workplace, job position, and the offenses for which he was disciplined, they do not assist him in establishing a prima facie case. Accordingly, his Title VII claim of disparate discipline will be denied. n9

B.

Plaintiff's next claim under Title VII is that his firing in 1996 was in retaliation for an EEOC complaint he had filed on or about December 1, 1995. n10 Defendant counters that the claim was not administratively exhausted, and that, even if it were, Plaintiff has neither established a prima facie case of retaliation nor demonstrated pretext.

Even assuming this retaliation claim is not administratively barred from consideration here, it still fails because Plaintiff has failed to make out a prima facie case of retaliation. A prima facie case of retaliation consists of three requirements: "(1) plaintiff engaged in protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; (3) a causal connection existed between the protected activity and the adverse action." Carter, 33 F.3d at 460. Plaintiff here filed an EEOC complaint and was fired, n11 thus meeting the first two requirements for a prima facie case. However, Plaintiff has failed to establish causation, as required by the third prong, because he has not offered evidence that the officials responsible for his termination knew of any EEOC complaint when he was fired. See, e.g., Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 444 (4th Cir. 1998) (rejecting retaliation claim where plaintiff provided no evidence that the supervisor who fired her knew of her discrimination claim); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998) (explaining that "the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case").

Plaintiff alleges that Haywood, director of distribution at the Landover warehouse, made the decision to fire Ingram. (Pl.'s Opp'n at 22.) Haywood has asserted in an affidavit that he did not know when he fired Ingram that Ingram had filed charges of race discrimination against Giant. (Haywood Supp'l Dec. P 4.) Similarly, Otis Ashton, Giant's Landover warehouse superintendent, also was present at Ingram's termination meeting and also has asserted that he did not know that Ingram had filed an EEOC complaint. (Ashton Dec. P 16.) Because he has not demonstrated knowledge of his complaint by the Giant managers who

terminated him, thus failing to show causation, Plaintiff cannot establish a prima facie case of retaliation as a matter of law. Defendant's motion as to Plaintiff's claim for retaliation will be granted.

III.

Giant next argues that it is entitled to summary judgment on Plaintiff's § 1981 claims, which parallel the claims he made under Title VII. The same elements of a prima facie case are required for § 1981 as for Title VII. See Gairola v. Virginia, 753 F.2d 1281, 1285 (4th Cir. 1985). Thus, because I have granted Defendant's motion as to Plaintiff's Title VII disparate treatment and retaliation claims, I will grant Defendant's motion as to Plaintiff's § 1981 disparate treatment and retaliation claims.

A separate order is attached.

Date: February 20, 2002

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Ingram has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Ingram's hostile environment claims under Title VII and section 1981 and state law claims against Giant, in addition to global arguments made by Ingram and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission and the viability of applying the continuing violation doctrine. Thus, this opinion focuses only on Ingram's

disparate treatment and retaliation claims under Title VII and section 1981.

n2 Giant claims that the discharge was effective March 26, 1996. (Def.'s Mem. at 6.) Plaintiff counters that his termination was not effective until May 1996. (Pl.'s Opp'n at 1.) For purposes of deciding this motion, I construe the evidence in the light most favorable to the Plaintiff and assume he was not terminated until May 1996. In any event, the difference between the two termination dates is not material for purposes of this motion.

n3 Ingram also denies submitting the false doctor's certificate as alleged by Giant. (Id. at 4.)

n4 "Disparate treatment occurs when an employer treats certain people less favorably than others on the basis of a protected classification such as race." Carter v. Ball, 33 F.3d 450, 456 n.7 (4th Cir. 1994).

n5 Plaintiff does not cite to the record for reference to an employee named "Diecher." (See Pl.'s Opp'n at 10.) Plaintiff thus appears to offer nothing but an inadmissible, unverified hearsay account of this allegedly comparable case.

n6 A last chance letter, known formally as a Conditional Return to Duty Agreement, subjects an employee to immediate discharge if he violates the agreement or engages in any further misconduct.

n7 Plaintiff also mentions a white employee who was not disciplined despite being caught having sex with a manager and a white employee who was fired for bringing a weapon to work but was immediately rehired. (Pl.'s Opp'n at 11.) Those two cases are in no way "like offenses" to Plaintiff's own. Cook, 988 F.2d at 511.

n8 Plaintiff also contends that white employees were treated differently than he was by being held to

different, lower production standards, and by having removed from their personnel files disciplinary notices they received for being outside their work areas that were filed later than the union contract allows, whereas similar late-filed notices remained in his personnel file. (Ingram Dep. at 76-77, 95.) None of these asserted instances of disparate treatment, however, rises above the level of hearsay, and therefore they are not sufficient to provide support to Plaintiff's case on a summary judgment motion. See Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996).

Further, a Title VII claim requires an "adverse employment action" that impacts the "terms, conditions, or benefits of employment." Von Gunten v. State of Maryland, 243 F.3d 858, 865 (4th Cir. 2001); see also Porter v. National Con-Serv, Inc., 51 F. Supp. 2d 656, 658 (D. Md. 1998), aff'd 173 F.3d 425 (4th Cir. 1999) (requiring proof of adverse employment action in case that involved, inter alia, claims of disparate disciplinary practices). Because Plaintiff has not presented any evidence that these actions were bases for his firing or otherwise adversely affected a term, condition, or benefit of his employment, he has not established the necessary prerequisite to a Title VII claim.

n9 Even if Plaintiff were to establish a prima facie case of disparate discipline, Giant has provided a legitimate, non-discriminatory reason for its disciplining of him: his unexcused absences and its conclusion that he had violated the company policy on honesty. Plaintiff has failed to prove that Defendant's proffered reason for discharging him was false, and that the real reason he was fired was his race, both of which are required to establish pretext. See DeJarnette v. Corning, Inc., 133 F.3d 293, 298 (4th Cir. 1998).

n10 Defendant asserts that Plaintiff's claim should fail because he has not produced the December 1, 1995

EEOC charge of discrimination. (Def.'s Reply at 10-11.) In his opposition, Plaintiff indicates that the charge is Exhibit 1, and was filed in December 1995 or January 1996. However, no such exhibit is attached to the opposition. Plaintiff does provide an EEOC charge information form date-stamped January 18, 1996, as part of the exhibits to his Amended Complaint. I thus assume this January 18, 1996 form is the one relevant to his retaliation charge, and, drawing inferences in favor of Plaintiff, that it is sufficient to constitute an EEOC "charge."

n11 I have accepted Plaintiff's May 1996 termination date as true for purposes of this motion. Although the parties dispute what action, if any, Plaintiff had pending before the EEOC in January 1996, they do not dispute that he filed an EEOC charge on April 2, 1996, before the date on which Plaintiff claims to have been fired.

Civil Action No.: JFM-02-539

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM INGRAM,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

Civil Action No.: JFM-02-540

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAVID NEWMAN,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For DAVID NEWMAN, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff David Newman has instituted this action against Giant Food, Inc. ("Giant") n1 alleging racially disparate treatment and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring and retention, and assault and battery. Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

David Newman was hired by Giant as a vacation relief worker at Giant's Landover, Maryland warehouse in August 1980. n2 After sixty days, Connor was hired into a permanent position in the Landover warehouse. Newman has held a number of positions at Giant, including as a selector, a janitor, in an inventory control position, as a forklift operator and in a receiving position. Currently, Newman is employed as a janitor. Throughout his employment, Newman has worked primarily in the meat and deli departments of the Landover warehouse.

On March 14, 1996, while Newman was working in an inventory control position in the warehouse aisles, a co-worker, Junior Fortney, blew the horn on the machine he was driving and told Newman to get out of his way. (Newman Dep. at 242.) When Newman did not immediately move, Fortney cursed at Newman, rolled by Newman on the machine and knocked over Newman's

merchandise. Newman responded by knocking over Fortney's merchandise. Fortney then approached Newman and the two men grabbed each other's shirt collars. (Id. at 243.) Once the two men released each other, Newman turned his back and Fortney charged at him with a case cutter, a small rectangular cylinder with a blade on the top, in an attempt to cut Newman's throat. (Id. at 243-44.) Newman raised his hand and blocked Fortney, but was cut on his pinky finger. Due to this cut, Newman went to the emergency room and was diagnosed as having a superficial laceration of the pinky finger that required five stitches. (Id. at 250-51.)

Following this altercation, Newman went to speak with his shift manager, Ralph Washington, Jr. Initially, Newman told Washington that he cut himself with a case cutter because he was aware of a Giant policy that stated that any employees involved in a fight would be terminated. (Id. at 245-46.) Newman, realizing that he could later be terminated for being dishonest, then told Washington that Fortney had cut him. (Id. at 246.) Washington called the police and an ambulance, Fortney was arrested, and Newman was taken to the hospital. (Id. at 247-48.)

Giant's policy states that "fighting on company property is prohibited regardless of provocation. Those causing fighting are subject to immediate termination." (See Mem. from Thurston to all Distribution Division Associates, Def. Ex. 2.) In accordance with this policy, Washington suspended both men on March 14, 1996. n3 Giant investigated the altercation, fired Fortney, n4 and reinstated Newman on March 28, 1996. Additionally, Newman was paid in full for the time during which he was suspended. (See Garrett Decl. at P 8.) n5

Sometime from 1993-1995, Newman heard from a co-worker that there was an emergency loan program. This program was not publicized in the warehouse, but

Newman heard that white employees were able to get loans in the past. Newman went to Vice-President Sam Thurston and asked him for a loan. Thurston gave Newman the loan, but told him not to tell anyone else. (Newman Dep. at 320.) When Newman told a black co-worker, Thurston gave that co-worker a loan and then canceled the program.

For several months, Newman took sick leave on the same day of each month (the day he earned an extra day of sick leave). After this occurred several times, Newman's manager spoke to him and told him that there would be disciplinary action if he continued this practice. Newman was never disciplined for taking sick leave, however, he states that a white co-worker also took sick leave on the same day of every month and was never disciplined or spoken to by a manager about the practice. (Id. at 342-44.) Finally, Newman alleges that he saw a white co-worker arrive late to work at least 23 times without being disciplined, while Newman was disciplined with a verbal warning or counseling letter when he arrived to work late. (Id. at 335-37.)

II.

Giant argues that it is entitled to summary judgment on Newman's claims for discriminatory discipline under Title VII and section 1981. n6 To establish a prima facie case of discriminatory discipline, Newman must show "(1) that he is a member of the class protected . . . (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against those other employees." Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993); Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985). If the plaintiff establishes a prima facie case, the burden shifts to the employer to advance a

legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If the employer successfully proffers such an explanation, the burden returns to the plaintiff to show that the proffered reason is a pretext for impermissible discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

Newman is unable to establish the third element of a prima facie case. Newman and Fortney were both initially suspended for fighting. Newman argues that he should not have been suspended, however, he also admits that he knocked over Fortney's merchandise and grabbed Fortney's collar. Giant's policy clearly states that employees caught fighting on Giant grounds are subject to immediate termination, regardless of provocation. Following investigation, Newman was reinstated and given backpay for the two weeks, during which he was suspended, while Fortney was terminated. (See Newman Dep. at 251; Fortney Termination Notice, Def. Ex. 4; Garrett Decl. at P 8.) The disciplinary measures suffered by Fortney were more severe than those suffered by Newman. Accordingly, summary judgment will be granted on Plaintiff's disparate discipline claims.

III.

Giant seeks summary judgment on Plaintiff's disparate treatment claims under section 1981. "As a general matter, to make out a prima facie case for employment discrimination, the Plaintiff must show that: (1) he is a member of a protected group; (2) he earned satisfactory performance marks; (3) he suffered an adverse employment action; and (4) other similarly situated employees outside his protected class were treated more favorably." McCain v. Waste Mgmt. Co.,

115 F. Supp. 2d 568, 573-74 (D.Md. 2000) (citations omitted).

Newman asserts that he suffered numerous instances of disparate treatment, however, only three alleged incidents occurred during the relevant time period: (1) denying Newman a no-interest emergency loan; (2) disciplining Newman for arriving late to work; and (3) discussing with Newman the appropriateness of taking sick leave on the same day of each month. (See Pl.'s Opp'n. at 28.) Newman is unable to establish the third element of a prima facie case for all three claims.

First, Newman is unable to establish that he suffered an adverse employment action in the claim involving the loan. To qualify as an adverse action, an employer's action must "adversely affect[] the 'terms, conditions, or benefits' of [the plaintiff's] employment." Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir.2001) (quoting Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 242 (4th Cir. 1997)). Although he was initially denied a loan, Newman received the only no-interest emergency loan he requested. n7 Since Giant provided Newman with the loan, Giant took no adverse employment action.

Second, Newman cannot establish that the verbal warning or counseling letter he received for arriving late was an adverse employment action. (See Newman Dep. at 336.) Such discipline, without evidence that the warning could lead to further disciplinary action, such as termination, does not constitute an adverse employment action. See Nye v. Roberts, 159 F. Supp. 2d 207, 213-14 (D. Md. 2001) (finding a written reprimand did not constitute an adverse employment action because "reprimands do not automatically affect the terms and conditions of employment" and the reprimand did "not state that it would lead to her termination or demotion or a decrease in pay"); see also

Von Gunten, 243 F.3d at 869 ("Terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from a state agency's disciplinary procedures."). Here, Newman has not presented any evidence that the verbal warning or counseling letter potentially led to termination, demotion, a decrease in pay or similar adverse action. Newman states that Giant's policy was to terminate an employee who was late to work eleven times. (See Newman Dep. at 337.) However, Newman has not presented any evidence that the reprimands at issue were counted against him under the policy. In fact, Newman's evidence suggests he simply was verbally reprimanded by a manager for being late, without any consequences. Thus, Newman is unable to establish that he suffered an adverse employment action. n8

Third, Newman cannot establish that the conversation he had with a manager concerning his sick leave constituted an adverse employment action. This conversation, in which a manager questioned Newman for taking sick leave every month on the same day (the day he earned an extra day of sick leave), did not adversely affect the terms, conditions, or benefits of Newman's employment. Newman was never disciplined. Additionally, he was acting improperly because he was not actually sick on those days. (See Newman Dep. at 342.) Newman suffered no adverse employment action under any of his section 1981 disparate treatment claims. Accordingly, summary judgment will be granted on those claims.

IV.

Giant moves for summary judgment on Newman's negligent hiring and retention claim. The Maryland Workers' Compensation Act ("WCA") preempts this tort action. Md. Labor & Employment Code Ann. § 9-101 *et*

seq. The WCA provides the exclusive remedy "to an employee 'for an injury or death arising out of and in the course of employment'" unless the injury is shown to be the result of "the deliberate intent of the employer to injure or kill the covered employee." Demby v. Preston Trucking Co., 961 F. Supp. 873, 881 (D. Md. 1997) (quoting LaGrimas v. Gossel, 1993 U.S. Dist. LEXIS 3783, 1993 WL 18951, at *3 (D. Md. 1993)); see also Tynes v. Shoney's Inc., 867 F. Supp. 330, 332 (D. Md. 1994); WCA § 9-509(d). There is no evidence that Giant deliberately intended to injure or kill Newman. Accordingly, summary judgment will be granted on the negligent hiring and retention claim.

Giant moves for summary judgment on Newman's assault and battery claims. The WCA also provides the exclusive remedy for this claim. Accordingly, summary judgment will be granted on the assault and battery claims.

A separate order is attached.

Date: 2/20/02

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Newman has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion addresses Newman's hostile work environment claims under Title VII and section 1981 and state law claims against Giant, except negligent hiring and retention and assault and battery, in addition to global arguments made by Newman and

other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission and the viability of applying the continuing violation doctrine. Thus, this opinion focuses only on Newman's discriminatory discipline claims under Title VII and section 1981, disparate treatment claims under section 1981 and Newman's state claims that are not addressed in the Carson opinion: negligent hiring and retention, and assault and battery.

n2 Vacation relief workers are part-time workers hired for up to one year to replace vacationing permanent workers. (See Giant Mem. at 5.)

n3 Newman stated that he returned to the Giant warehouse after going to the emergency room and was notified that he was terminated. Newman returned to the deli department, escorted by a guard, and saw Fortney working and celebrating with co-workers. Still, all documentation shows that Fortney was suspended sometime on March 14, 1996 and there is no evidence Fortney worked at Giant after this date. (See Fortney Termination Notice, Def. Ex. 4.)

n4 Newman believes that Giant's documentation showing that Fortney was terminated as a result of the fight was "manufactured." (See Pl.'s Opp'n. at 10; Newman Dep. at 256-57.) Newman believes that Fortney was fired for providing false information on his employment application. However, documentation provided by Giant shows that Newman was terminated both for fighting and for providing false information. (See Fortney Termination Notice, Def. Ex. 4.)

n5 In his opposition, Newman's attorney argues that Newman was not paid and points to his deposition for support of that argument. However, in his deposition, Newman stated that he could not remember if he received backpay. (Newman Dep. at 262) (emphasis

added). Newman never stated that he did not receive backpay for this time period.

n6 "Under Title VII and . . . Section 1981, the elements of the required prima facie case are the same." Gairola v. Com. of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985).

n7 Newman provides no evidence that the loan "program may very well still exist at Giant and may not be offered to African-Americans." (See Pl.'s Opp'n. at 39.)

n8 Even if Newman could establish that he suffered an adverse employment action, there is no evidence of pretext. Newman was reprimanded for being late and there is no evidence that he was not late or that Giant did not believe he was late.

Civil Action No.: JFM-02-540

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAVID NEWMAN,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

CIVIL NO. JFM-02-541

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY BLOCKER,
Plaintiff,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

COUNSEL: For ANTHONY BLOCKER, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff Anthony Blocker has instituted this action against Giant Food, Inc. ("Giant") n1 alleging discrimination on the basis of race under Title VII and § 1981, quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress and negligent infliction of emotional distress. n2 Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

Blocker was hired by Giant as a vacation relief worker at Giant's Landover, Maryland warehouse in October 1989. He was hired into a permanent position as a produce selector in the Landover warehouse three months later. A produce selector is a warehouse employee who selects produce items from the warehouse to ship to various Giant stores. "Some of the items could be as light as two pounds on up to maybe seventy or eighty pounds." Blocker Dep. at 38. Throughout his employment at Giant, Blocker was a member of the Warehouse Employees Local Union No. 730.

On July 18, 1994, Blocker slipped on the stairs and fell as he left the warehouse during a break. The fall injured Blocker's back, but the next day Blocker saw a physician who released him to work on "modified duty." n3 He was limited to lifting no more than ten pounds. See Med. Certif. dated July 19, 1994, Def.'s Ex. 5. Giant sets out the purpose, eligibility requirements and specifications of its modified duty program in a

memorandum that employees must sign to enter the program. Blocker signed this memorandum on July 20, 1994. Def.'s Ex. 1. According to the memorandum, Giant's modified duty program "is designed for associates who are recovering from a temporary disability and are unable to fulfill all of the requirements of their present job." In particular, "it is designed for [employees] whose physicians feel that an early and gradual return to work will facilitate a speedy and total recovery." Id.

From August 15 through August 22, 1994, Blocker took medical leave from Giant. Med. Certif. dated August 15, 1994, Def.'s Ex. 6. Blocker returned to the modified duty program on August 23, 1994 and the next day signed a new memorandum acknowledging the terms of the program. Def.'s Ex. 2. The same day that he signed the memorandum to return to modified duty, Blocker went on medical leave because he was unable to work at all. See Med. Certif. dated August 24, 1994, Def.'s Ex. 9. Blocker did not successfully return to his position after this date. He periodically presented Giant with medical certifications that stated that he was unable to work. On November 14, 1995, Blocker submitted a medical certification that stated "no work 3 months more." Med. Certif. dated November 14, 1995, Def.'s Ex. 20. On December 27, 1995, Blocker attempted to return to the modified duty program, presenting Giant with a medical certification stating that he should lift no more than 15 pounds. See Med. Certif. dated December 26, 1995, Def.'s Ex. 21. Giant refused to let Blocker return to the modified duty program.

While Blocker was unable to work, he was paid disability benefits by Giant's worker's compensation carrier, Kemper Insurance Co. On February 14, 1995, Dr. Antoni B. Goral examined Blocker for Kemper. Dr. Goral concluded that Blocker had a permanent injury

and had reached "Maximal Medical Improvement." Let. from A. Goral to B. Green dated Feb. 14, 1995 at 2-3, Def.'s Ex. 12. He concluded that Blocker could "return to a work status which requires no repetitive bending or lifting of greater than twenty five pounds repetitively, for a period of four weeks, after which time he [could] resume a full work status." Id. at 3. In April 1995, Blocker also underwent an Ergonomics Physical Abilities Test designed to replicate the physical requirements of his job. See Dennison Decl. at P 7. After less than two minutes, he had to stop the test due to his medical condition. On May 9, 1995, Dr. Goral examined Blocker again and concluded that Blocker was not "capable of working in an environment which requires prolonged standing, walking or heavy lifting." Let. from A. Goral to B. Green dated May 9, 1995 at 3. On July 10, 1995, Giant's Modified Duty Placement Committee considered Blocker's situation and unanimously recommended that Blocker be removed as a warehouse employee and assisted in locating another less strenuous position at Giant. Dennison Decl. at P 9. On July 17 and August 31, 1995, Giant wrote letters to Blocker informing him of its decision and asking him to contact its employment office regarding reassignment. See Lets. to A. Blocker from R. Crescenzi dated July 17, 1995 and Aug. 31, 1995, Def.'s Ex. 15, 16.

In mid-October 1995, Blocker met with Bea Schlesinger of the Giant employment office. Ms. Schlesinger reviewed with Blocker job opportunities that were available with Giant and Blocker told her that he was either not qualified for them or unable to perform them due to his physical condition. See Blocker EEOC Aff. at 3, Def.'s Ex. 17. On October 27, 1995, Giant informed its insurer, Kemper, of Blocker's meeting with Schlesinger. On October 30, 1995, Kemper terminated Blocker's disability benefits because he refused Giant's

reassignment offer. Termination of Temp. Disab. Form dated October 30, 1995, Def.'s Ex. 19.

On January 4, 1996, Blocker filed a new claim with the Worker's Compensation Commission, stating that he had a "temporary total disability from 10/16/95 present and continuing." Worker's Compensation Commission Claim dated Jan. 4, 1996, Def.'s Ex. 23. The Commission awarded Blocker benefits for 30 days from the date of the hearing while Giant tried to place Blocker in a job. Worker's Comp. Comm'n Award dated Feb. 27, 1996, Def.'s Ex. 26. From January through March 1996, Giant attempted to place Blocker in a new job at Giant, see Def.'s Exs. 27-29, and Kemper hired an employment consultant to help Blocker find a job outside of Giant, see Blocker Dep. at 197. Eventually, Blocker ended his relationship with the counselor and Kemper immediately halted his benefits. See Blocker Dep. 202-204.

Blocker filed another Worker's Compensation Commission Claim on November 1, 1996 claiming that he had a permanent injury to his back. Worker's Comp. Comm's Claim dated Nov. 1, 1996. On January 14, 1998, Kemper and Blocker agreed that Kemper would pay Blocker $ 20,000 to satisfy his Worker's Compensation Claim. The Worker's Compensation Commission approved the settlement on March 30, 1998. Worker's Comp. Comm'n Order dated March 30, 1998.

II.

Blocker has made claims under Title VII and § 1981 of racial discrimination based on disparate treatment and retaliation. For both of these claims, he has not met his burden under the three-part burden shifting scheme of McDonnell Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). n4 Summary judgment will be granted as to these claims.

A.

Blocker's disparate treatment claim is based on Giant's refusal to allow him to return to light duty on December 27, 1995. In order to establish a prima facie case of racial discrimination based on disparate treatment, Blocker must show that (1) he is a member of a protected class; (2) he was qualified to return to modified duty on that date; (3) he did not get to return to modified duty; and (4) other employees who are not members of the protected class and who were similarly situated were placed in the modified duty program. See Taylor v. Va. Union. Univ., 193 F.3d 219, 233 (4th Cir. 1999) (en banc). If Blocker establishes a prima facie case, the burden shifts to Giant to advance a legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If Giant successfully proffers such an explanation, the burden returns to the plaintiff to show that the proffered reason is a pretext for impermissible discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

Viewing the evidence in the light most favorable to Blocker, he has failed to establish the second and fourth elements of the prima facie case. Giant's modified duty program was for employees who were recovering from temporary disabilities, were expected to return to regular duty within 90 days and whose recovery was likely to be aided by a partial workload. See Def.'s Ex. 1. Blocker did present Giant with a medical certification on December 27, 1995 that stated that he was ready to return to light duty. See Def.'s Ex. 21. However, the certification does not specify how long it would be before Blocker could return to regular duties. Id. In addition, this certification cannot be reconciled with the medical certificate from the same doctor six weeks

earlier stating that Blocker could not work for three more months, Def.'s Ex. 20, or Blocker's January 4, 1996 Worker's Compensation claim that states that he had temporary total disability from "10/16/95 present and continuing," Def.'s Ex. 23. In fact, the report from the physician that completed both medical certificates indicates that he changed his diagnosis only because Blocker requested that he do so. See Pl.'s Ex. 109. Based on the present record, Blocker has failed to show that he was qualified for Giant's modified duty program.

In addition, Blocker has not shown that other employees not in a protected class were given modified duty under similar circumstances. To satisfy this prong of the prima facie case, Blocker relies on several affidavits by warehouse workers. However, these affidavits contain general statements that the workers had seen white employees be on modified duty for more than 90 days. They do not specify the types of injuries the white employees had sustained or their prognosis for returning to regular duty. See Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996) (holding that affidavits that are conclusory can not be used to oppose motion for summary judgment). Blocker also submits the produce seniority list and the worker's compensation awards of a number of Giant employees that were injured yet still appear on the list. The awards do not specify the race of the employees, whether they were currently or ever in the modified duty program or whether they were capable of returning to regular duty despite their injuries. This evidence does not show that similarly situated white employees were placed in the modified duty program. n5 Thus, Blocker has not established the fourth element of a prima facie case of disparate treatment.

B.

Blocker's retaliation claim could potentially be based on several different actions by Giant. In his complaint, Blocker claims that Giant ceased worker's compensation payments to him on August 15, 1996, in retaliation for his filing an EEOC discrimination charge on May 7, 1996. Compl. PP 100, 102. Blocker's reply brief focuses on the claim that Giant terminated him in November 1996 n6 in retaliation for filing this suit two months earlier. Pl.'s Reply Br. at 14. In order to establish a prima facie case of retaliation, Blocker must show that: "(1) he engaged in a protected activity; (2) the employer took an adverse employment action against him; and (3) a causal connection existed between the protected activity and the asserted adverse action." Von Gunten v. Md., 243 F.3d 858, 863 (4th Cir. 2001). Even if I assume that Blocker is able to establish a prima facie case of retaliation, n7 his claim still fails. Giant has offered legitimate non-discriminatory justifications for its actions and Blocker has not proven that they were merely pretext for retaliation.

Giant has offered legitimate non-discriminatory justifications for both adverse employment actions that Blocker claims were retaliatory. First, Blocker's worker's compensation benefits were terminated because he declined to work with the employment counselor that Kemper had procured for him. See Blocker Dep. at 204 ("The relationship between myself and the counselor was severed. The payments were severed also.") Second, Giant terminated Blocker because it believed he had a permanent injury that precluded warehouse work and Blocker had refused its offers of reassignment to a different position. See Pl.'s Opp'n Br. at 14.

Blocker argues that these non-discriminatory justifications were merely pretext for retaliation

because white employees with similar injuries remained in selector positions and were not required to look for jobs outside of Giant with the help of an employment counselor. As discussed above, Blocker has failed to provide specific evidence to support his claim regarding white employees. His argument is also contradicted by his statement in his Worker's Compensation Claim that he was unable to work as a selector. For these reasons, Blocker has not met his burden of showing that Giant's reasons were merely pretext for retaliation. Thus, Blocker's retaliation claim must fail. Settle v. Balt. County, 34 F. Supp. 2d 969, 991 (D. Md. 1999) (explaining that the plaintiff bears "the ultimate burden of projecting evidence sufficient to prove that [he has] been the victim[] of discriminatory treatment"); Evans, 80 F.3d at 959 (citations omitted). ("The defendant-employer has an opportunity to present a legitimate, non-discriminatory reason for its employment action. If the employer does so, the presumption of unlawful discrimination created by the prima facie case "drops out of the picture" and the burden shifts back to the employee to show that the given reason was just a pretext for discrimination.")

A separate order is attached.

Date February 20, 2002

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Blocker has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc.,

JFM-96-2882. That opinion also addresses Blocker's state law claims against Giant, in addition to global arguments made by Blocker and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission. Thus, this opinion focuses on Blocker's disparate treatment and retaliation claims under Title VII and section 1981.

n2 On August 7, 1997, I dismissed Blocker's claims based on § § 1985 and 1986, the Equal Pay Act and the Americans with Disabilities Act.

n3 Giant used the terms modified duty and light duty interchangeably.

n4 The analysis and result are identical under Title VII and Section 1981. See Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985) ("Under Title VII and . . . § 1981, the elements of the required prima facie case are the same.").

n5 Blocker also attempts to rely on his own statements to establish this element of the prima facie case. However, his statements offer little, if any support, in establishing that similarly situated white employees were treated more favorably. See Blocker Dep. at 79-80 ("On December 27th, 1995 there were white counterparts that I worked with that were on light duty and same injuries or same restrictions or possibly different, I'm not sure because I'm not privy to their medical documentation."); see also Blocker EEOC Aff. at 2 (listing black and white employees who participated in Giant's modified duty program and black and white employees who were denied entry into the program). In addition, mere allegations by Blocker are insufficient to establish a prima facie case. Blocker "is required to identify specific evidence in the record, and to articulate the 'precise manner' in which that evidence supported

[his] claim." Causey v. Balog, 929 F. Supp. 900, 910 (D. Md. 1996), aff'd, 162 F.3d 795 (4th Cir. 1998) (citations omitted).

n6 Blocker does not point to a specific place in the record to indicate when Giant actually terminated him.

n7 Giant argues that the alleged adverse employment action, cessation of Blocker's worker's compensation benefits, was caused by Kemper, not Giant.

CIVIL NO. JFM-02-541

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY BLOCKER,
Plaintiff,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

CIVIL NO. JFM-02-542

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAURICE MATHEWS,
Plaintiff,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

COUNSEL: For MAURICE MATHEWS, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MEYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MEYERS, ROBERT (BOB) HAYWOOD, defendants: Kathleen L. Jennings, Kristin E. Adler, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., defendant: Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For PETE MANOS, SAM THURSTON, MARIA MEYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, interested party: Marc A. Stefan, Carey R. Butsavage, Butsavage and Associates, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff Maurice Mathews has instituted this action against Giant Food, Inc. ("Giant") n1 alleging discrimination on the basis of race under Title VII and Section 1981, quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and wrongful termination. n2 Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

Mathews began working in Giant's Landover warehouse in 1979. During his employment there, he has been a janitor, selector and forklift operator. During Mathews' tenure, he received occasional notices for violating Giant's attendance policy and absence notification procedure. See Def.'s Ex. 6. Giant allowed each employee two days of emergency personal leave each year to be used in situations where employees needed to take leave on short notice. Giant defined emergency personal leave as "any non-illness or non-injury situation which is determined to be totally beyond [an employee's] control and prevents an employee from meeting [his] work schedule." Def.'s Ex. 5. On March 17, 1995, Mathews used his second emergency personal leave day of the calendar year. See id.

On April 17, 1995, Mathews failed to arrive for an 8:00 a.m. overtime shift for which he had signed up. Mathews did not notify Giant within two hours after the start of the shift so his absence was considered unexcused. See Giant's Absence Notification Guidelines, Def,'s Ex. 3 ("Failure to notify within two hours after the start of your shift will cause the absence to be considered unexcused."). In accordance with Giant's unexcused absenteeism policy, see Def.'s Ex. 4, Mathews was given a written warning which advised him that a second unexcused absence within six months would lead to a three-day suspension without pay. See Disciplinary Notice dated April 17, 1995, Def.'s Ex. 7. On July 3, 1995, Mathews again failed to work an overtime shift and did not notify Giant that he would be unable to work the shift. Mathews was suspended for three days for this second unexcused absence. See Disciplinary Notice dated July 7, 1995, Def.'s Ex. 8. Finally, on Labor Day weekend, Mathews failed to work an overtime shift for which he had signed up. Mathews was suffering from a severe sinus infection and had become confused. He believed that his shift did not start until 8:00 a.m. when it actually had started at midnight. See Mathews' Dep. at 126. He went to the emergency room for treatment at 3:30 a.m. and did not contact Giant until he returned home, approximately seven hours into the shift. See id. at 123-127. In accordance with its unexcused absenteeism policy, Giant terminated Mathews.

Mathews filed a grievance through his union and at the grievance hearing, he asked for a "Last Chance Letter." A "Last Chance Letter" is formally known as a Conditional Return to Duty Agreement. It allows an employee that commits a terminable offense to return to duty subject to the provisions of the agreement. See Haywood Decl. P 42. Mathews was denied a "Last Chance Letter" and his termination was effective

October 10, 1995. See EEOC Charge of Discrimination, Def.'s Ex. 9.

II.

Mathews has asserted Title VII and § 1981 claims of discriminatory discharge. In order to establish a prima facie case of discriminatory discharge, a plaintiff must show that "(1) [he] is a member of a protected class; (2)[he] was qualified for [his] job and [his] job performance was satisfactory; (3)[he] was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." Porter v. National Con-Serv, Inc., 51 F. Supp. 2d 656, 659 (D. Md. 1998) (citing Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995)); see also Karpel v. Inova Health System Serv., 134 F.3d 1222, 1228 (4th Cir. 1998). If Mathews establishes a prima facie case, the burden shifts to Giant to advance a legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If Giant successfully proffers such an explanation, the burden returns to the plaintiff to show that the proffered reason is a pretext for impermissible discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). Mathews has failed to establish the second and fourth element of the prima facie case of discriminatory discharge. Therefore, summary judgment will be granted on Plaintiffs' Title VII and § 1981 claims. n3

Giant's Absence Notification Guidelines required Mathews to notify Giant that he would miss his shift within two hours of that shift starting. See Def.'s Ex. 3. Mathews concedes that he violated this policy on three separate occasions. See Mathews' Dep. at 78, 83-84, 87-88, 96, 123-127. Mathews' violation of Giant's policy indicates that his performance was not satisfactory. See

Blair v. Colonnas Shipyard Inc, 52 F. Supp. 2d 687, 694 (E.D. Va. 1999), aff'd mem., 203 F.3d 819 (4th Cir. 2000) ("Accordingly, since [employee] violated policies that the [employer] considered 'very important,' he did not perform his job satisfactorily and cannot establish a prima facie case of race discrimination."); see also Farasat v. Paulikas, 32 F. Supp. 2d 249, 255 (D. Md. 1998), aff'd mem., 166 F.3d 1208 (4th Cir. 1998) (holding that employee's performance was unsatisfactory in part because he was tardy on a regular basis).

Mathews argues that Giant's policies do not apply to overtime shifts because they are voluntary. See Mathews' EEOC Charge Information Form, Def.'s Ex. 9. However, it is consistent and logical for 7Giant to require employees to follow the same absence notification guidelines for voluntary overtime shifts once the employee has committed to working that shift. In addition, Mathews deposition testimony makes clear that he knew the policy required him to call Giant within two hours of the shift starting even though it was an overtime shift. See Mathews' Dep. at 126 (stating that he would have called in within two hours of the beginning of the shift to avoid termination if he had realized that he was scheduled to work). Mathews also complains that Giant would not accept his medical documentation regarding the unexcused absence. See Mathews' EEOC Charge Information Form, Def.'s Ex. 9. This may be so, but it does not address the reason for Mathews' termination: three violations of Giant's policy regarding absence notification. n4

Mathews has also failed to show that white employees that repeatedly violated the absence notification guidelines or similar policies were not terminated. Mathews has named a number of white employees whom he believes were similarly situated and were not terminated. n5 From an examination of the

affidavits in the record, it appears that employees named Schmidt, Hoile, Warner, Blanford and "Moonchicken" possibly had attendance problems. See generally Flint, Figueroa, Gamble, Hines and Wedge Affs. However, these affidavits, besides being primarily hearsay and speculation, contain only general statements regarding these individuals' behavior that do not meet Mathews' burden of establishing that these Caucasian employees also repeatedly violated Giant policies, that Giant policies required the employees' termination and that the employees were not terminated. See Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996) (holding that affidavits that are conclusory and based on hearsay can not be used to oppose motion for summary judgment). Therefore, Mathews has failed to establish the fourth element of the prima facie case of discriminatory discharge.

A separate order is attached.

Date February 20, 2002

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Mathews has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Mathews' hostile work environment claims under Title VII and section 1981 and state law claims against Giant, in addition to global arguments made by Mathews and other Plaintiffs concerning the early right-to-sue notices

issued to them by the Equal Employment Opportunity Commission and the viability of applying the continuing violation doctrine. Thus, this opinion focuses only on Mathews' discriminatory discharge claims under Title VII and section 1981.

n2 On August 7, 1997, I dismissed Mathews' claims based on § § 1985 and 1986, the Equal Pay Act and the ADEA.

n3 The analysis and result are identical under Title VII and Section 1981. See Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985) ("Under Title VII and . . . § 1981, the elements of the required prima facie case are the same.").

n4 There is a possible tension between Giant's Absence Notification Guidelines and Article 18(c) of the warehouseman's union contract which requires employees to notify Giant of an illness that requires the use of sick leave on the first "day of absence, unless illness is of such nature that employee is rendered incapable of compliance with this requirement." See Agreement Between Giant Food Inc. and Warehouse Employees Local Union No. 730 November 13, 1994 Through November 8, 1997, Def.'s Ex. 1. Article 24.1 of the union contract also states that "the employee shall see that the Employer is notified of his inability to report for work as near his starting time as possible on his first (1st) day of absence." However, pursuant to Article 27 of the union contract, any disputes that arise regarding the terms of the contract must be resolved through a written grievance and arbitration.

n5 Mathews argues that some white employees were not disciplined at all, while others were given a "Last Chance Letter," which he was denied. I consider both types of employees mentioned by Mathews.

CIVIL NO. JFM-02-542

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAURICE MATHEWS,
Plaintiff,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

Civil Action No.: JFM-02-543

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

W. KIRB QUALLS, JR.,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

COUNSEL: For W. KIRB QUALLS, JR., plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiff W. Kirb Qualls, Jr. has instituted this action against Giant Food, Inc. ("Giant") n1 alleging racially disparate treatment, failure to promote and hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, discrimination under the American with Disabilities Act ("ADA"), quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

In 1966, Qualls was hired as a produce clerk at Giant. Qualls was promoted to the position of Assistant Produce Manager in 1967. Qualls resigned his position as produce manager in approximately 1976 and continued with Giant as a produce clerk. Sometime between 1986 and 1989, Qualls spoke to management about being promoted to produce manager again. Qualls' name was submitted for promotion by his supervisor. (Qualls Dep. at 43.) However, Qualls was not selected for promotion. Qualls did not speak to anyone about promotion or apply for a new position throughout the 1990s. Qualls was employed in the produce department at Giant Store # 50 at White Oak Shopping Center from 1987 to 1996.

In September 1994, Qualls suffered a work-related back injury. He was unable to work for one week, but then continued to work until October 1995, when he

experienced back problems again. On October 31, 1995, Qualls was placed on disability leave. Qualls was released by his physician to return to work on light duty on January 22, 1996, but was unable to lift heavy items. While on light duty, Qualls' duties included washing items and shelves, pushing shopping carts, bagging groceries, and working in the flower department. (Id. at 190-91, 193.) In March 1996, Qualls returned to full duty. Sometime later in 1996, Qualls retired after thirty years of employment with Giant.

On May 28, 1996, Qualls filed a charge of discrimination with the Montgomery County Human Relations Commission ("MCHRC"). The charge stated that Qualls was discriminated against and harassed because of his race, age, and physical handicap. The charge dealt exclusively with Qualls' back injury, alleged harassment of Qualls by his managers about his ability to work during the period he was on light duty, and a request to work during the morning shift.

On October 30, 1996, Qualls requested that the MCHRC transfer his case to the Equal Employment Opportunity Commission ("EEOC") and that the EEOC issue an immediate right-to-sue letter. The EEOC granted Qualls' request.

II.

Giant makes two arguments in support of its summary judgment motion. First, Giant argues that Plaintiff did not exhaust his administrative remedies as required by Title VII. Second, Giant argues that Plaintiff cannot establish a prima facie case of discrimination.

A.

Giant argues that Qualls failed to exhaust his administrative remedies because he did not include the claims that he is bringing in his administrative charge.

"The scope of the civil action is limited to the 'administrative investigation that could reasonably be expected to follow from the administrative charges of discrimination.'" Jones v. Giant Foods, Inc., 2000 U.S. Dist. LEXIS 21813, *12, 2000 WL 1835393, at *4 (D. Md. 2000) (quoting Johnson v. Maryland, 940 F. Supp. 873, 876 (D. Md. 1996)); see also Taylor v. Virginia Union Univ., 193 F.3d 219, 239 (4th Cir. 1999) (en banc) (stating that "only those discrimination claims stated in the administrative charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit") (citations omitted). In his Amended Complaint and Opposition Memorandum, Plaintiff makes numerous discrimination charges against Giant relating to punctured tires, failure to promote, racial graffiti and slurs, a hostile work environment and discriminatory discipline. Qualls is limited to a Title VII suit involving those claims made in his 1996 claim to the MCHRC and the EEOC: complaints concerning his back injury and the discrimination resulting from that injury.

B.

Plaintiff fails to establish a prima facie case of discrimination regarding his timely claims of disparate treatment discrimination. To proceed on a claim of disparate treatment under Title VII or section 1981, n2 a plaintiff must establish a prima facie case consisting of four elements: (1) the employee is a member of a protected class; (2) the employee was qualified for the job and his performance was satisfactory; (3) in spite of his qualifications and performance, the employee suffered adverse employment action; and (4) the employee was treated differently from similarly situated employees. See McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973);

Williams v. Cerberonics, Inc., 871 F.2d 452, 455 (4th Cir. 1989); Nichols v. Caroline County Bd. of Educ., 123 F. Supp. 2d 320, 325 (D. Md. 2000). The first two elements of the prima facie case are undisputed. Plaintiff is African-American. Plaintiff also qualified for his position.

Plaintiff is unable to establish the third and fourth elements of a prima facie case. An employer's act must alter the terms, conditions or benefits of employment to qualify as an adverse employment action. Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001). Plaintiff asserts that he suffered an adverse employment action when he was placed on light duty in a department other than his own department in January 1996. However, there is no evidence that Giant altered the terms, conditions or benefits of Qualls' employment. Plaintiff has provided no evidence that being placed on light duty in his own department was a term, condition or benefit of his employment. See Von Gunten, 243 F.3d at 867 (stating that it was not clear that use of a state vehicle was a benefit of the plaintiff's employment); Copes v. Henderson, 2001 U.S. Dist. LEXIS 10643, 2001 WL 812353, at *5 (D. Md. 2001) ("The mere transfer of an employee or an alteration in her job responsibilities does not constitute adverse employment action."); cf. Johnson v. Quin Rivers Agency for Community Action, Inc., 140 F. Supp. 2d 657, 666 (E.D. Va. 2001) (noting that a transfer to another office was not a demotion and, therefore, not an adverse action). Plaintiff is, therefore, unable to establish that he suffered an adverse action.

Even assuming Plaintiff suffered an adverse action, he is unable to establish the fourth element of a prima facie case. Plaintiff asserts that no other employee was placed on light duty outside of his or her department during his thirty years of employment at Giant. (Qualls Dep. at 195-96.) Plaintiff also asserts that two other

white employees on light duty at the same time as Qualls were allowed to remain on light duty in their departments. n3 (Id. at 197.) However, Plaintiff has not established that these two employees, or any other employee who was ever on light duty, were similarly situated to the plaintiff. For example, there is no evidence concerning the injuries of these other two employees, the limitations caused by those injuries or the tasks these employees performed while on light duty. Therefore, the plaintiff is also unable to satisfy the fourth element of a prima facie case of discrimination. Accordingly, summary judgment will be granted on Plaintiff's disparate treatment claims.

III.

As indicated above, Qualls' failure to promote claim under Title VII is barred because of his failure to exhaust his administrative remedies as to that claim. He asserts a similar claim under section 1981, as to which there is no administrative exhaustion requirement. See Evans v. Giant Food, Inc., 2000 WL 1835398, at *7 (D. Md. 2000). Therefore, I will briefly address that claim on the merits.

To prove a prima facie case of discriminatory refusal to promote, a "plaintiff must prove that (1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for the position; and (4) plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994) (citations omitted). Plaintiff did not apply for an open position or attempt to have his name submitted n4 during the three-year statute of limitations period. Therefore, Plaintiff is unable to establish the second element of a prima facie case of discrimination by failure to promote. Accordingly, summary judgment

will be granted on Plaintiff's section 1981 failure to promote claim.

IV.

Giant next argues that it is entitled to summary judgment on Plaintiff's claim under the ADA. "An individual is disabled under the ADA or the Rehabilitation Act if he or she: (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Davis v. University of North Carolina, 263 F.3d 95, 99 (4th Cir. 2001) (citing 42 U.S.C.A. § 12102(2) (1995); 29 U.S.C.A. § 705(20)(B)). Plaintiff's back injury prevented him from lifting heavy objects. Plaintiff is unable to establish that he had a physical impairment that substantially limited a major life activity. The term "'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 (4th Cir. 1997) (citation and footnote omitted); see also Fitch v. Solipsys Corp., 94 F. Supp. 2d 670, 675-76 (D. Md. 2000) (stating that a medical condition that prevented heavy lifting of more than forty pounds was not a disability where it was not permanent). Plaintiff has presented no evidence that his back injury was permanent or that his injury substantially limited any major life activity. It is not clear which major life activity Plaintiff is asserting was limited, but assuming it is working, walking, lifting or another similar life activity, Plaintiff returned to full duty only five months after being placed on disability leave and two months after being placed on light duty. (See Charge to MCHRC, Def. Mem. Ex. 2.) Accordingly, summary judgment will be granted on Plaintiff's claim under the ADA.

A separate order is attached.

Date: 2/20/02

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Qualls has also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Qualls' hostile work environment claims under Title VII and section 1981 and state law claims against Giant, in addition to global arguments made by Qualls and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission and the viability of applying the continuing violation. Thus, this opinion focuses only on Qualls' disparate treatment claims under Title VII and section 1981, failure to promote claims under Title VII and section 1981 and his ADA claim.

n2 "Under Title VII and . . . Section 1981, the elements of the required prima facie case are the same." Gairola v. Virginia, 753 F.2d 1281, 1285 (4th Cir. 1985).

n3 Specifically, Plaintiff refers to two employees, one in the meat department and one in the pharmacy department. (Qualls Dep. at 197.)

n4 According to Plaintiff, the promotion procedure at Giant was an informal process involving managers submitting the names of worthy employees who were then selected on a merit basis. (Qualls Dep. at 39-45.)

Civil Action No.: JFM-02-543

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

W. KIRB QUALLS, JR.,
Plaintiff

v.

GIANT FOOD, INC., et al.,
Defendants

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiff on all causes of action in Plaintiff's complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

CIVIL NO. JFM-02-544

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN DALLAS, JR. and DAVID JONES,
Plaintiffs,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

COUNSEL: For DAVID JONES, plaintiff: JoAnn Patricia Myles, Law Office, Largo, MD USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Robert P. Watkins, Julie Hilden, Kumiki Gibson, Kathleen L. Jennings, Kristin E. Adler, Jeffrey M Smith, Williams and Connolly LLP, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Mark Scott London, London & Mead, Washington, DC USA.

For GIANT FOOD, INC., PETE MANOS, SAM THURSTON, MARIA MYERS, ROBERT (BOB) HAYWOOD, DEBORAH LILLY, CHRIS BALLADEMAS, TOM MAYNARD, defendants: Claudette V. Ferron, Law Office, PH, Washington, DC USA.

JUDGES: J. Frederick Motz, United States District Judge.

OPINION BY: J. Frederick Motz

OPINION:

Plaintiffs John Dallas, Jr. and David Jones have instituted this action against Giant Food, Inc. ("Giant") n1 alleging discrimination on the basis of race under Title VII and § 1981, quantum meruit, discrimination under the Maryland Human Relations Act, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and wrongful termination. n2 Defendant now moves for summary judgment on all counts. The motion will be granted.

I.

Dallas, Jones, and two other employees, Robert Gray and Leon Mason, were hired by Giant as vacation relief workers at Giant's Landover, Maryland warehouse on June 22, 1995. Vacation relief workers are short-term workers hired for up to one year to replace vacationing permanent workers. See Agreement Between Giant Food, Inc. and Warehouse Employees Local Union No. 730, § 15.6, Nov. 13, 1994 through Nov. 8, 1997 ("union contract"). Throughout their employment at Giant, Dallas and Jones were members of the Warehouse Employee's Local Union No. 730 and their employment was governed by the union contract in effect at the time.

On February 12, 1996, Giant had two permanent positions available. Giant hired permanent employees from its pool of vacation relief workers, rather than seek applicants from outside the company. Haywood Decl. P 9. It chose Robert Gray and Joseph Arnold, a vacation relief worker hired on July 13, 1995, to fill these two

permanent position. Dallas and Jones were released after twelve months of employment.

Dallas and Jones believed that permanent positions were to be filled based solely on seniority of vacation relief workers, with the seniority of employees hired on the same day determined alphabetically by last name. See Dallas EEOC Charge, Def.'s Ex. 7; Jones EEOC Charge, Def.'s Ex. 8. Giant states that its policy was to hire the "best of the best" vacation relief workers for permanent positions. It determined the "best of the best" by considering factors such as the quality and quantity of work performed, attendance, willingness to work overtime and seniority. See Def.'s Br. at 5. Dallas and Jones, who are African-American, believe that Giant discriminated against them based on race by hiring Arnold and Gray, who are Caucasian, for the permanent positions even though they had less seniority.

Dallas and Jones also allege numerous incidents of disparate treatment while they worked at Giant. In particular, they claim that white employees got two weeks of training without evaluation while they got three days of training and were evaluated during their first two weeks. On one occasion, a white employee was given a certification after he completed training on a Radox machine while they were not given a certification after they completed training. In addition, white employees were able to bypass the normal assignment distribution method and were given preferential assignments. Plaintiffs were told to pick up cigarette butts in the parking lot if they finished their work early while white employees were allowed to leave early with full pay for the shift. Several times, managers would cross Plaintiffs' names off of bid sheets when Plaintiffs attempted to bid for permanent jobs. Throughout their employment at Giant, Plaintiffs were also exposed to racial graffiti on a regular basis. See generally Pl.'s Br. at

6-16. These allegations might form the basis of a hostile work environment claim. However, as I discuss below, Plaintiffs are barred from making such a claim.

II.

In their opposition to Giant's motion for summary judgment, Dallas and Jones argue that they have made a claim of hostile work environment pursuant to Title VII and § 1981. However, Plaintiffs' EEOC Charges of Discrimination did not make a hostile work environment claim, which precludes Plaintiffs from making such a claim based on Title VII here. See Taylor v. Virginia Union Univ., 193 F.3d 219, 239 (4th Cir. 1999) (en banc) ("Only those discrimination claims stated in the administrative charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit") (citations omitted). Paragraph 48 of the Amended Complaint specifies the grounds for Plaintiffs' § 1981 claim. It does not state that Dallas and Jones were making a hostile work environment claim, nor does it set forth any specific grounds for such a claim. For this reason, Plaintiff may not allege a violation of § 1981 based on a hostile work environment claim. See Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (stating that complaint must give "fair notice of what the plaintiff's claim is and the grounds upon which it rests").

III.

Plaintiffs have made Title VII and § 1981 claims of discriminatory hiring and termination in their EEOC Charges of Discrimination and in their Amended Complaint. However, Plaintiffs have not met their burden under the three-part burden shifting scheme of McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817; 36 L. Ed. 2d 668 (1973). n3 Therefore, summary

judgment will be granted on Plaintiffs' Title VII and § 1981 claims.

A.

In order to establish a prima facie case of discriminatory hiring or failure to promote, a plaintiff must show that: "(1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." Brown v. McLean, 159 F.3d 898, 902 (4th Cir. 1998). If Dallas and Jones establish a prima facie case, the burden shifts to Giant to advance a legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If Giant successfully proffers such an explanation, the burden returns to the plaintiffs to show that the proffered reason is a pretext for impermissible discrimination, See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). Giant contends that Dallas and Jones are unable to establish the third and fourth elements of their prima facie case. Viewing the evidence in the light most favorable to the Plaintiffs, they are able to establish a prima facie case of discrimination.

Regarding the third element of the prima facie case, Giant does not argue that Dallas and Jones were not qualified because they were incapable of performing the permanent job that they were denied. Instead, they argue that Dallas and Jones were not qualified because it was Giant's policy to hire only the "best of the best" vacation relief workers for permanent positions. Giant management believed that Dallas and Jones were not the best of the best. See Def.'s Br. at 24. Giant's argument may be a legitimate reason for not hiring Dallas and Jones, but it does not address whether they

were qualified for the position they desired. Dallas and Jones both received regular reviews as vacation relief workers that confirmed that they met job standards, were consistently dependable and sometimes exceeded standards. See Dallas Distribution Probationary Review Forms, Def.'s Ex. 4; Jones Distribution Probationary Review Forms, Def.'s Ex. 5. This confirms that they were qualified for a permanent position performing the same duties that they performed as vacation relief workers.

Giant acknowledges that the fourth element of a prima facie case is usually satisfied by showing that the position a plaintiff sought was filled by a white applicant. See Def.'s Br. at 24 (citing Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994)). It also does not contest the fact that Arnold and Gray, the two applicants who received the jobs that Dallas and Jones sought, are white. Instead, Giant claims that the usual inference is inappropriate where, as here, the same person that hired the employee initially is also responsible for making further employment decisions regarding the employee. See id. (citing Taylor, 193 F.3d at 231). They argue that it is illogical for the same person that initially decided to hire an employee to then act in a discriminatory manner toward that employee in future employment actions. While such an inference may be illogical, and therefore inappropriate, in a situation where an employee is hired and fired from a single position by the same person, that is not the case here. In this case, the same person, Ollie Johnson, was responsible for hiring for two distinct jobs – vacation relief workers and permanent selectors. It is not illogical for a supervisor that discriminates to hire Dallas and Jones as vacation relief workers, a less desirable and lower paying job, while hiring white co-workers over Dallas and Jones for the more desirable permanent positions. Thus, showing that whites were given the positions Plaintiffs sought is sufficient to

establish the fourth element of a prima facie case even though the same individual that hired Plaintiffs also made the hiring decisions regarding permanent positions.

Giant has offered a legitimate, non-discriminatory reason for not hiring Dallas and Jones. Giant claims that, at the time, it hired permanent employees from the "best of the best" vacation relief workers. In determining the "best of the best," Giant considered work quality and quantity, attendance, willingness to work overtime and length of employment. Haywood Decl. P 11. Giant considered Arnold and Gray to be the "best of the best" vacation relief workers and hired them for the two permanent positions that were available. See Johnson Deck PP 9-11. Giant has satisfied its burden of coming forward with a legitimate non-discriminatory justification for its action. Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) ("Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision.").

Dallas and Jones have not shown that Giant's reason for hiring Arnold and Gray was merely a pretext for discrimination against them. First, Plaintiffs' evidence does not support their claim that Giant's practice was always to hire vacation relief workers for permanent positions based on seniority. Plaintiffs' own deposition statements contradict such a proposition. See Dallas Dep. at 19 ("[The orientation leader] stated how to go about getting a job, permanent job at Giant Food. He said your attendance would be a factor, your production, and the, you know, like overtime."); Jones Dep. at 29-31 (stating that he was told at orientation that performance, attendance and any disciplinary record would be considered when hiring permanent employees).

Second, Dallas and Jones have not shown that they were better qualified for the positions given to Arnold and Gray. See Young v. Lehman, 748 F.2d 194, 198 (4th Cir. 1984) ("The rule in this circuit is that where relative qualifications are advanced as the nondiscriminatory reason for an employment decision, the plaintiff has the burden of establishing that [he] was better qualified than the successful applicant."). Plaintiffs offer no evidence regarding Gray's qualifications and Jones acknowledged that under his alphabetical seniority hiring theory, Gray would have received the position rather than he because they were hired on the same day and Gray comes before Jones alphabetically. See Jones Dep. at 57. Regarding Arnold, they argue that he was less qualified than they were because he was hired after them and had poor attendance. See Dallas Dep. at 58; Jones Dep. at 39-43. However, Arnold's employment records indicate that he missed only one day while working as a vacation relief worker and that he received high marks for attendance and punctuality. See Haywood Decl., Ex. A. Furthermore, Giant claims that it based its hiring decisions on a variety of factors, not just on attendance and seniority. Therefore, even if Arnold's attendance record was not completely accurate and Arnold's attendance was actually worse than that of Dallas and Jones, that does not prove that Dallas and Jones were better qualified for the permanent position. Plaintiffs' have failed to show that Giant's reason for hiring Gray and Arnold was merely pretext for discrimination. Therefore, their claim of discriminatory hiring must fail. See Settle v. Balt. County, 34 F. Supp. 2d 965, 991 (D. Md. 1999) (explaining that the plaintiff bears "the ultimate burden of projecting evidence sufficient to prove that [he has] been the victim[] of discriminatory treatment"); Evans, 80 F.3d at 959 (citations omitted). ("The defendant-employer has an opportunity to present a legitimate, non-discriminatory reason for its

employment action. If the employer does so, the presumption of unlawful discrimination created by the prima facie case "drops out of the picture" and the burden shifts back to the employee to show that the given reason was just a pretext for discrimination.").

B.

Dallas and Jones base their claim of discriminatory termination on their termination from the position of vacation relief worker on June 21, 1996. In order to establish a prima facie case of discriminatory termination, a plaintiff must show that "(1) [he] is a member of a protected class; (2)[he] was qualified for [his] job and [his] job performance was satisfactory; (3)[he] was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." Porter v. National Con-Serv, Inc., 51 F. Supp. 2d 656, 659 (D. Md. 1998) (citing Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995)); see also Karpel v. Inova Health System Serv., 134 F.3d 1222, 1228 (4th Cir. 1998).

Plaintiffs are unable to establish the second and fourth prong of the prima facie case. The union contract allows Giant to employ a vacation relief worker for up to one year. Plaintiffs had completed one year of employment as a vacation relief worker at Giant at the time of their termination. Therefore, they were no longer qualified to be vacation relief workers. In addition, Dallas and Jones have not offered evidence of any white vacation relief worker that was retained by Giant for more than one year.

Plaintiffs have failed to meet their burden on either a discriminatory hiring or a discriminatory termination claim under Title VII and § 1981. For this reason, summary judgment as to Counts I and IV will be granted.

A separate order is attached.

Date February 20, 2002

/s/

J. Frederick Motz

United States District Judge

Footnotes

n1 Dallas and Jones have also asserted claims against several of Giant's employees. Those defendants are entitled to summary judgment for the reasons stated in the accompanying opinion in Carson v. Giant Food, Inc., JFM-96-2882. That opinion also addresses Dallas and Jones' state law claims against Giant, in addition to global arguments made by Dallas, Jones and other Plaintiffs concerning the early right-to-sue notices issued to them by the Equal Employment Opportunity Commission. Thus, this opinion focuses only on Dallas and Jones' hostile work environment claims and discriminatory hiring and termination claims under Title VII and section 1981.

n2 On August 7, 1997, I dismissed Plaintiffs' claims based on § § 1985 and 1986 and the Equal Pay Act.

n3 The analysis and result are identical under Title VII and Section 1981. See Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985) ("Under Title VII and . . . § 1981, the elements of the required prima facie case are the same.").

CIVIL NO. JFM-02-544

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN DALLAS, JR. and DAVID JONES,
Plaintiffs,

v.

GIANT FOOD, INC., et al.,
Defendant.

February 20, 2002, Decided

ORDER

For the reasons stated in the accompanying Opinion and in the related Opinion in the case of Carson v. Giant Food, Inc., JFM-96-2882, it is, this 20th day of February 2002

ORDERED

1. Defendants' motions for summary judgment against Plaintiffs on all causes of action in Plaintiffs' complaint are Granted; and

2. Judgment is hereby entered in favor of the Defendants.

/s/

J. Frederick Motz

United States District Judge

No. 97-2240

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GREGORY CARSON; WILBERT SKIPPER, JR.; MELVYN CONNORS; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR.; DAVID JONES; JERRY MUNGRO,
Plaintiffs-Appellees,

v.

GIANT FOOD, INC.; PETER MANOS; SAMUEL THURSTON; MARIA MYERS; ROBERT HAYWOOD; DEBORAH LILLY; TOM MAYNARD; CHRISTOPHER BALODEMAS,
Defendants-Appellants.

March 5, 1999, Argued
April 29, 1999, Decided

COUNSEL: ARGUED: Kumiki San Gibson, WILLIAMS & CONNOLLY, Washington, D.C., for Appellants.

William Ray Ford, Camp Spring, Maryland, for Appellees.

ON BRIEF: Robert P. Watkins, WILLIAMS & CONNOLLY, Washington, D.C.; Robert B. Fitzpatrick, FITZPATRICK & ASSOCIATES, Washington, D.C., for Appellants.

Jo Ann P. Myles, Largo, Maryland, for Appellees.

JUDGES: Before WILKINSON, Chief Judge, and WILKINS and LUTTIG, Circuit Judges. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Luttig joined.

OPINION BY: WILKINSON

OPINION:

OPINION

WILKINSON, Chief Judge:

Eleven current and former employees brought individual and class claims of race, age, and disability discrimination against their employer, Giant Food, Inc., and individual Giant officers and managers. After examining four collective bargaining agreements (CBAs) between the employees' unions and Giant, the district court refused to compel arbitration. On appeal, Giant argues that the district court should have let the arbitrator decide which claims were arbitrable and that the CBAs required the arbitration of discrimination claims. We reject both arguments. First, the CBAs do not clearly and unmistakably provide that an arbitrator is to decide which claims the parties agreed to arbitrate. Second, the CBAs do not clearly and unmistakably require the arbitration of statutory discrimination claims. Thus, we affirm the judgment of the district court.

I.

Plaintiffs are current and former African American employees of the supermarket food chain Giant Food. Claiming that Giant and its officers and managers discriminated against employees on the basis of race, age, and disability, plaintiffs brought suit in September 1996. They alleged numerous individual and class claims, including claims under Title VII, 42 U.S.C. §

1981, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The employees sought compensatory and punitive damages totaling $ 300 million, injunctive and declaratory relief, reinstatement of discharged employees, and attorneys' fees.

In response, defendants noted that the named plaintiffs were represented by four different unions which had entered into four different CBAs. Defendants asserted that each of those CBAs required the arbitration of employee statutory discrimination claims. They based their argument on two clauses – a nondiscrimination clause and an arbitration clause – that appear in each CBA.

The nondiscrimination provisions in the four CBAs are similar. The CBA negotiated by the United Food and Commercial Workers Union, Local 400, includes a clause in the preamble:

> WHEREAS, the Employer and the Union in the performance of this Agreement agree not to discriminate against any employee or applicant for employment because of race, color, religious creed, origin, age or sex.

The preamble of the CBA signed by the International Brotherhood of Teamsters, Local 639, contains an identical clause, except that the word "Company" is substituted for the word "Employer." The CBA agreed to by the Teamster's Warehouse Employees Local 730 similarly states that

> The Employer and the Union in the performance of this Agreement agree not to discriminate against any employee or applicant for employment because of race,

> sex, age, color, religious creed or national origin.

And the fourth CBA, entered into by the Teamster's Automotive Employees Local 922, provides

> The Employer and the Union agree that neither will discriminate either directly or indirectly, nor will they permit any of their agents, members or representatives to discriminate either directly or indirectly, against any employee by reason of race, creed, color, national origin, age, sex, or member ship or activity in the Union.

In addition to the nondiscrimination provisions, the four CBAs also contain arbitration clauses defining the scope of arbitrable matters. The CBAs for Locals 639, 730, and 922 each state that

> Should any grievance or dispute arise between the parties regarding the terms of this Agreement, [the parties will try to resolve the matter]. . . . If agreement cannot be reached, the parties agree that within five (5) days they shall select a neutral and impartial arbitrator . . . .

The arbitration clause negotiated by Local 400 is slightly different, requiring arbitration of any "controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement."

Asserting that the language of these agreements required the arbitration of plaintiffs' claims, defendants moved for summary judgment. The district court denied this motion in August 1997. n1 It found that the language of the CBA antidiscrimination and arbitration clauses was not broad enough to require the arbitration of

plaintiffs' claims under Title VII, section 1981, the ADEA, and the ADA. n2 The district court certified this issue for interlocutory appeal, 28 U.S.C. § 1292(b), and we granted defendants' petition for permission to appeal.

II.

The public benefits of arbitration in the collective bargaining context are well known. Arbitration "reflects both our tradition of resolving private sector disputes without public sector interference and a desire to quickly and efficiently resolve labor grievances before they threaten economic progress on a broad front." Westvaco Corp. v. United Paperworkers Int'l Union, Local 1014, 171 F.3d 971, 1999 U.S. App. LEXIS 5166, 1999 WL 164141, *3 (4th Cir. 1999). The private settlement of labor disputes through arbitration has been a "major factor in achieving industrial peace." United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

While arbitration serves important public interests, an agreement to arbitrate – like any other contract – is fundamentally about private choice. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. at 582. Despite the public benefits of arbitration, the determination of what disputes are arbitrable is focused on the intent of the parties. See AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 648-49, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) ("Arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."). Generally, the parties – not the courts – control which disputes will be arbitrated.

III.

The initial question presented in this case is who – a court or an arbitrator – determines whether each CBA requires the arbitration of plaintiffs' statutory discrimination claims. That is, did the parties agree to arbitrate the very issue of what claims are arbitrable?

Generally, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); see also Warrior & Gulf, 363 U.S. at 582-83. This presumption, however, does not apply to the issue of which claims are arbitrable. "The general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves." Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993). Thus, "Courts should not assume that the parties agreed to arbitrate arbitrability." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995).

The Supreme Court has explained the reasons for this reverse presumption. It has stated that the "willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced . . . if a labor arbitrator had the power to determine his own jurisdiction." AT&T Techs., 475 U.S. at 651 (internal quotation marks omitted). And, it has noted that a "party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." First Options, 514 U.S. at 945.

Nevertheless, the parties can agree to let an arbitrator determine the scope of his own jurisdiction.

Their agreement must, however, "clearly and unmistakably" provide that the arbitrator shall determine what disputes the parties agreed to arbitrate. AT&T Techs., 475 U.S. at 649; accord First Options, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (internal quotation marks omitted)).

Defendants argue that the CBAs here clearly and unmistakably committed arbitrability to arbitration. They note that the CBAs provided for the arbitration of "any grievance or dispute arising between the parties regarding the terms of this Agreement" and any "controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement." Because the dispute over whether statutory discrimination claims are arbitrable requires an interpretation of the terms of the CBAs, defendants assert that the parties agreed to resolve this threshold dispute by arbitration. Thus, defendants claim that the parties agreed to arbitrate arbitrability.

We disagree. The "clear and unmistakable" test set forth by the Supreme Court requires more than simply saying that the arbitrator determines the meaning of any disputed contractual terms. The courts have repeatedly rejected the assertion that general arbitration clauses, like the ones at issue here, commit to arbitration disputes over an arbitrator's jurisdiction.

For example, in AT&T Technologies, Inc. v. Communications Workers of America, the collective-bargaining contract committed to arbitration all "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." 475 U.S. at 645. Still, the Supreme Court held that "It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to

be resolved through arbitration." 475 U.S. at 651. Similarly, in John Wiley & Sons, Inc. v. Livingston, the Supreme Court addressed a contract providing for the arbitration of "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement." 376 U.S. 543, 553, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964). Despite this language, the Court itself decided that the union's claims were in fact arbitrable. Id. at 554-55; see also Warrior & Gulf, 363 U.S. at 576, 583 n.7. Elsewhere the Supreme Court has explained that even "'when the parties have agreed to submit all questions of contract interpretation to the arbitrator,'" the judiciary is still "'to ascertain[ ] whether the party seeking arbitration is making a claim which on its face is governed by the contract.'" United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36-37, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987) (quoting United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960)). Thus, broad arbitration clauses that generally commit all interpretive disputes "relating to" or "arising out of" the agreement do not satisfy the clear and unmistakable test.

Cases in this circuit reinforce this point. In Brown v. Trans World Airlines, this court encountered a CBA which required the arbitration of all "disputes between the Union, employee, and the Company growing out of the interpretation or application of any of the terms of this Agreement." 127 F.3d 337, 338 (4th Cir. 1997). In spite of this language, we stated that "The determination of the arbitration provision's scope and meaning is for the court to resolve." Id. at 340. Even broader language was used in Virginia Carolina Tools, Inc. v. International Tool Supply, Inc. The agreement in that case did not even restrict the scope of arbitration to matters of interpretation or differences growing out of the

agreement. Instead, it capaciously stated that "Should any dispute arise between the parties they agree to seek resolution through [arbitration]." 984 F.2d at 115. Nonetheless, we noted that

> We need not decide if anything short of a specific, express provision, such as "all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration," would meet[the clear and unmistakable] test. It suffices to say that the typical, broad arbitration clause [like this one] – which contains nothing approaching such a provision – does not.

Id. at 117.

The lesson from these cases is that if contracting parties wish to let an arbitrator determine the scope of his own jurisdiction, they must indicate that intent in a clear and specific manner. Expansive general arbitration clauses will not suffice to force the arbitration of arbitrability disputes.

Here, the parties failed to so agree. The four CBAs at issue in this case have broad clauses requiring arbitration to resolve disputes "regarding the terms of this Agreement" and "concerning the interpretation of the provisions of this Agreement." These general clauses are indistinguishable from those at issue in the cases discussed above. Thus, we are compelled to find they do not clearly and unmistakably commit questions of arbitrability to arbitration. A court, not an arbitrator, is to determine whether the parties agreed to arbitrate the statutory discrimination claims at issue here.

We stress, however, that arbitration of arbitrability disputes – like other contractual matters – remains a question of the parties' intent. Those who wish to let an

arbitrator decide which issues are arbitrable need only state that "all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration," or words to that clear effect. Absent such clarity, we are compelled to find that disputes over the arbitrability of claims are for judicial resolution.

IV.

We thus proceed to determine whether the parties agreed to arbitrate the discrimination claims arising under Title VII, 42 U.S.C. § 1981, the ADEA, and the ADA. Like the previous issue, this question is one of contract and is to be resolved by the parties' expressed intentions.

Union-negotiated collective bargaining agreements that require the arbitration of statutory discrimination claims are valid and binding on unionized employees. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). In Austin , we noted that under Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), employees were free to enter into predispute agreements to arbitrate statutory employment claims. Austin, 78 F.3d at 880-82. And we found no reason to preclude enforcement of such agreements when they were entered into as part of a CBA. "A union has the right and duty to bargain for the terms and conditions of employment. . . . The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right." 78 F.3d at 885. Agreements to arbitrate statutory claims are "'valid because they rest on the premise of fair representation.'" Id. (quoting Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983)). Thus, when a union has agreed to arbitrate statutory claims, "an employee must follow the grievance procedure

established by the collective bargaining agreement prior to filing suit in federal court." Id.

Recently, in Wright v. Universal Maritime Service Corp., 525 U.S. 70, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998), the Supreme Court set forth the test required to determine whether there has been a union-negotiated waiver of a judicial forum. There, the Court held that the normal interpretative rule applicable to collective bargaining agreements – one which presumes a dispute is arbitrable – does not apply to statutory discrimination claims. 119 S. Ct. at 395-96. Instead, collective bargaining agreements to arbitrate these claims, unlike contracts executed by individuals, must be "clear and unmistakable." Id. at 396.

Defendants argue that the CBAs in this case clearly and unmistakably require arbitration of employee federal discrimination claims. Each of those CBAs contains a specific provision banning discrimination on the basis of race and age. Further, the agreements provide for the arbitration of all disputes "regarding the terms" and "concerning the interpretation of the provisions" of the agreements. Taken together, defendants argue this language clearly and unmistakably provides for the arbitration of statutory discrimination claims.

We disagree. Broad, general language is not sufficient to meet the level of clarity required to effect a waiver in a CBA. In the collective bargaining context, the parties "must be particularly clear" about their intent to arbitrate statutory discrimination claims. Universal Maritime, 119 S. Ct. at 396. Here, the parties were not that clear.

The Supreme Court's opinion in Universal Maritime indicates that the requisite degree of clarity can be achieved by two different approaches. The first is the

most straightforward. It simply involves drafting an explicit arbitration clause. Under this approach, the CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment. Such a clear arbitration clause will suffice to bind the parties to arbitrate claims arising under a host of federal statutes, including Title VII, 42 U.S.C. § 1981, the ADEA, and the ADA.

The second approach is applicable when the arbitration clause is not so clear. General arbitration clauses, such as those referring to "all disputes" or "all disputes concerning the interpretation of the agreement," taken alone do not meet the clear and unmistakable requirement of Universal Maritime. When the parties use such broad but nonspecific language in the arbitration clause, they must include an "explicit incorporation of statutory antidiscrimination requirements" elsewhere in the contract. Universal Maritime, 119 S. Ct. at 396. If another provision, like a nondiscrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims.

The CBAs in this case failed to follow either approach. The arbitration clauses in the CBAs state broadly that the parties agree to arbitrate all disputes over the meaning of the agreement. No mention, however, is made of disputes arising under federal law. This sort of general arbitration clause does not satisfy the demand of particular clarity. Nor do the other provisions of the contract persuade us that the plaintiffs' statutory claims have been incorporated into the CBAs. The agreements do contain antidiscrimination provisions stating that the company and the union agree not to discriminate on the basis of race or age. They do

not, however, begin to incorporate by reference federal statutory law. The absence of transparency in both the arbitration and nondiscrimination clauses fails to meet the "clear and unmistakable" standard set forth in Universal Maritime. Thus, we hold that the CBAs at issue in this case did not commit to arbitration the resolution of the employees' federal statutory discrimination claims.

V.

Our decision does not seek to undermine private choices about how best to resolve industrial disputes. This case presents two issues which require the parties to use "clear and unmistakable" language expressing a desire to arbitrate. With respect to each, we hold that clear and unmistakable does not mean general language that under ordinary principles of contract interpretation might very well be interpreted to require arbitration. Instead, a CBA must plainly specify the intent to have an arbitrator decide both the scope of his own jurisdiction and the merits of federal statutory discrimination claims. If an agreement does so, the judiciary will give full effect to that intent. The CBAs in this case, however, are simply not clear and unmistakable with respect to these issues. The judgment of the district court is hereby affirmed and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED

Footnotes

n1 The district court did, however, grant other motions of defendants. It dismissed plaintiffs' claims under the Equal Pay Act, Executive Order No. 11246, and 42 U.S.C. § § 1985 & 1986. The court also dismissed the Title VII, ADEA, and ADA claims against the individual defendants. And it dismissed the ADEA

claims of individual plaintiffs W. Kirb Qualls and Maurice Mathews and the section 1981 claims against defendant Tom Maynard. None of these dismissals is before us.

n2 The district court's judgment with respect to the Title VII, section 1981, and ADEA claims applied to all four of the CBAs in this case. By contrast, its judgment of nonarbitrability with respect to the ADA claims was limited to the effect of the Local 400 CBA. The district court found that the Local 400 CBA did not require the arbitration of ADA claims, and this refusal has been appealed. The arbitrability of ADA claims under the CBAs signed by Locals 639, 730, and 922 is not before us. The district court did not reach the issue under the Local 639 and 922 CBAs. And it found that the Local 730 CBA required the arbitration of ADA claims; that ruling has not been appealed.

No. 02-1319
CA-02-544-JFM
CA-02-543-JFM
CA-02-542-JFM
CA-02-541-JFM
CA-02-540-JFM
CA-02-539-JFM
CA-02-538-JFM
CA-02-537-JFM
CA-96-2882-JFM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILBERT SKIPPER, JR.; MELVYN CONNOR; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR.; DAVID JONES,
Plaintiffs-Appellants,

and

GREGORY CARSON; JERRY MUNGRO,
Plaintiffs,

v.

GIANT FOOD INCORPORATED; PETER MANOS, in his official capacity; SAMUEL THURSTON, in his official capacity; MARIA MYERS, in her official capacity; ROBERT HAYWOOD, in his official capacity; DEBORAH LILLY, in her official capacity; TOM MAYNARD, in his official capacity; CHRIS BALLADEMAS, in his official capacity,
Defendants-Appellees,

And

UNITED FOOD & COMMERCIAL
WORKERS UNION, Local 400,
Party in Interest.

Filed July 8, 2003

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and petition for rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc and,

As the panel considered the petition for rehearing and is of the opinion it should be denied.

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for the Court

/s/ Patricia S. Connor
Clerk

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,
Plaintiffs,

v.

GIANT FOOD, INC., ET AL.,
Defendants.

AFFIDAVIT OF RUDY BROWN
IN SUPPORT OF PLAINTIFFS' OPPOSITIONS TO
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I Rudy Brown hereby swear under the penalty of Perjury that the following statements are true and correct to the best of my knowledge and belief.

That I am over the age of eighteen and competent to give testimony in the above captioned matter. I am African American male.

1. That I have personal knowledge as to the facts and circumstances in the above captioned action. That I am currently an employee at Giant Food, Inc. ("Giant") in the Landover, Maryland Warehouse.

2. I was hired by Giant Food, Inc. ("Giant") on April 13, 1959. I have been employed at Giant for forty two (42) years. I am a member of Union Local 730. I have been a shop Steward at Giant for Union Local 730 for thirty eight (38) years. I have participated in approximately ten to twelve union contract negotiations. I am familiar with Union Local 730

contract language and what it means and has meant through the years.

3. I participated in the negotiation and drafting of the Agreement between Giant Food, Inc. and Warehouse Local Union 730, effective from November 13, 1994 through November 8, 1997 ("Local 730 Contract") and its most recent 2001 contract.

4. I have observed, experienced and fought against racial discrimination in Giant's warehouses throughout the forty two (42) years that I have worked at Giant.

5. I have observed and have knowledge of Giant's policies and practices and its course of dealings with the union.

6. Through the years Giant and Union Local 730 have not agreed on many of Giant's attempts to impose certain policies in the workplace especially when those policies contradict the parties contract (Collective Bargaining Agreement) between them.

7. Through my forty two (42) years at Giant. I have made and have had African American Giant employees make countless complaints about racial discrimination at Giant. I have personally had countless discussions and conversations, with Samuel Thurston, Bob Haywood, Deborah Lilly, Pete Manos and former president of Giant Izzy Cohen about the racial climate and atmosphere in the Landover warehouse. As to each of these individuals my complaints and union members complaints they went unanswered for decades.

8. I and other union members and shop stewards such as Robert Flint, Nathan Smith, David Newman, Theodore Hines and many others have requested from

Giant to post its company policies. At each union contract negotiation this has been an issue and a continuous demand from Giant but to no avail.

9. In my 38 years as a shop steward I have represented thousands of union members and many have been disciplined for alleged by violating company policies that either did not exist or was never told to them. Most of these employees were African Americans. I have observed and experienced Giant treating Blacks different than white employees who have committed the same or similar infraction.

10. In numerous grievance hearings I have objected to the unfair treatment of blacks such as Maurice Mathews and David Newman. I have also seen Giant manufacture and create a policy on the spot in order to protect a white employee's job status. I have also seen Bob Haywood rescind a company policy and create a new one to save a white employee's job while holding black employees to Giant's policies.

11. As to myself, I have been unfairly disciplined because of my union activities and my constant complaints through the years about the presence of racial discrimination in the workplace. Specifically I recall after thirty (30) years of service at Giant terminated me for allegedly eating a damaged yogurt. However, Giant had at the time no such policy and it had allowed employees to eat damaged goods all the time and for many years. I was terminated and for approximately a month walked everyday outside of Giant protesting with a picket sign about my termination. My own union did not represent me.

12. It was not until a petition was signed by numerous co-workers and union members objecting to

my dismissal because Giant not only never had a policy on not eating damaged goods it allowed the employees to eat damaged goods in the workplace. See Ex. A. This is a true copy of the petition that was signed at that time.

13. Giant reluctantly gave me my job back only after I signed a last chance letter on January 27, 1989. Ex. B. The Last Chance Letter was created by Giant. Three days later Giant on January 30, 1989 instituted a policy that employees could not eat damaged goods. Ex. C. In Giant's policy statement it claimed that there had always been a policy and maybe everyone was not aware of it. However, that was untrue because Giant had never had such a policy and the employees knew that Giant had never had such a policy. Giant created the policy for the first time after it fired me in 1989, which it still does not adhere to today.

14. Through the years at Giant I had numerous discussions with Vice President Al Dobbins concerning the issue of race discrimination in the warehouse. Giant did not like my complaints and categorized me as a problem. Giant also tried to curtail and stop my union activities. One of my biggest complaints was about the treatment of vacation relief workers being denied union representation.

15. I am also familiar with how vacation relief workers are selected for permanent positions and the agreement of Giant and the union on the hiring of vacation relief workers. I as a shop steward would call Ollie Johnson periodically to check on the status of permanent positions for Vacation relief workers.

16. Vacation relief workers did not exist in the warehouse until approximately the late 1970's early

1980's. It has been my observation and experience at Giant that Vacation relief workers were hired into permanent positions based on their seniority. The union contract requires that Giant maintain a vacation relief seniority list. I have observed vacation relief workers through the years bidding on vacancies in the warehouse.

17. Also under Union Local 730's contract open job positions are to be posted. Vacation relief bided on open positions in the warehouse for more than ten years.

18. I have observed vacation relief workers being selected for permanent positions based on their seniority hire date. Giant and the union put that policy and practice finally in the 1997-2001 contract. It was specifically agreed by Giant and Union Local 730 that the parties policy, practice and agreement to promote and hiring vacation relief based on seniority would be put in writing in the November 1997-2001 contract.

19. Also as an employee and shop steward I observed and knew that Giant was required to give vacation relief employees monthly evaluations. However I can recall employees complaining to me that it would be 3-4 months before they even received their evaluations. When these vacation relief workers complained to me I told them I could not represent them through the grievance process.

20. It was also my observation and experience that Giant controlled the union grievance process. The first and second steps of the grievance process has always been controlled by Giant. When the grievance meetings opened Giant manager Bob Haywood would always speak at the first step meeting. At the second step meeting Eric Weiss from Labor Relations usually began

the meetings off. I have heard Weiss tell Union Local 730's Representative Roy Essex not to open his mouth in the grievance meeting. Weiss allowed the Union little input. We called the process "a kangaroo court." I observed and experienced that Giant allowed the union to win grievances only if it wanted them to win. Giant usually took the word of its managers. It rarely took the word of any Black employee unless a white employee corroborated the Black employees version of the facts. In these grievance hearings with Giant I represented many Black employees who had valid medical documentation or other forms of documentation showing that they had had an emergency situation and was unable to call in or come in. Usually Giant management ignored or discredited black employees documentation and disciplined or terminated them. As to all of these things I observed Giant management simply did not do to white employees in the workplace.

21. Also Giant's second step grievance process is not automatic. The union member request a second step meeting. However, I have observed and experienced that many Black union members who would request a second step meeting, Giant would refuse to schedule a meeting. I have also observed when Giant would not give Black employees a first step grievance hearing. Although the union contract requires a hearing in ten days, I have observed that when Giant did allow a hearing many Blacks got hearings after waiting 1-4 months or even longer.

22. Other unfair treatment in the warehouse towards African Americans ("Blacks") included Giant issuing warning notices to Blacks beyond 24 hours of allegedly committing a company violation. Under Union 730's Contract Giant must issue a "Warning Notice" to an employee within 24 hours of the employee committing

the alleged infraction. Giant violated this part of the union contract routinely when it came to disciplining African Americans. I did not observe Giant issuing untimely "Warning Notices" to white employees. I remember when this provision was negotiated in the union contract. It was to prevent Giant managers from issuing warning notices weeks, months and years after they claimed that an employee had allegedly committed an infraction. I have observed Giant managers writing and issuing warning notices months after an alleged infraction allegedly took place and when the employee complained Giant has refused to rescind the warning notice.

23. Also Giant and Union 730 agreed that "warning notices' were "null and void" after six (6) months. Additionally Giant did not have the discretion of determining which timely filed grievances it will hear. The union and Giant have no such agreement. Nor does the Union and Giant have an "understanding" that Giant can terminate and discipline employees for not calling in for doing overtime. Overtime is voluntary. An employee can show for overtime and leave 2 minutes after he punches in to work overtime and the employee cannot be disciplined in any way.

24. I am also familiar and have knowledge about Giant's "Absence Notification" Policy." However, Giant and Union Local 730 have agreed to a policy on Absence Notification, Sick leave and other issues in the union contract. The union and Giant's agreement on Absence Notification and sick leave did not include or apply to employees working overtime. Union Local 730 and Giant had no understanding that these policies would apply to overtime. If there is a conflict with the union contract and any policy that Giant wants to create it has always

been the agreement that the Union 730 contract will prevail.

25. I recall when Giant terminated Maurice Mathews in 1995 for a third unexcused absence based on Giant's own "Absence Notification" policy. I represented Maurice Mathews several times in 1995 on this issue when Giant disciplined and then terminated Mathews. I recall that Mr. Mathews was terminated in 1995 for allegedly not notifying his manager within 2 hours of the start of a overtime shift that he was unable to come in to do overtime. Giant claimed that this was Mr. Mathews third offense within six (6) months, however it was not.

26. I observed that in 1995 at the time that Mathews was terminated Giant had no such policy that an employee could be disciplined or terminated for not notifying the company within 2 hours of the start of the shift for overtime that the employee was not coming in or was going to be late. I also represented Mathews when he was suspended after receiving a second warning notice for not notifying Giant that he was not able to come in to do overtime. However, Giant issued to Mathews an untimely "warning Notice". Mathews' second warning notice was issued beyond the 24 hours of the alleged violation. Mathews filed his grievance with me. Both Mathews and I challenged the untimeliness of the "Warning Notice." I recall taking the complaint. Mathews and I went to Brian Lally and objected to the untimely warning notice that was issued to Mathews. I asked that it be rescinded based on the agreement between Giant and the union. Lally refused to rescind the untimely warning notice. Mathews was suspended when he should not have been. On the third occasion, Mathews brought in medical documentation to show he had a medical emergency and was incapable of calling in timely. I observed Bob Haywood refuse to

accept Mathews' medical documentation. However under the union contract and Giant's own policies Mathews was to have received an excused absence because he had a medical emergency. Once Mr. Mathews brought in his medical documentation Giant's own policy and under the union contract required that Giant give Mathews an excused absence.

27. After Mathews was terminated, I observed that very shortly thereafter white employee Jim Schmidt did the identical thing that Mathews did. Schmidt failed to call in to notify Giant in 1995 that he was unable to do overtime. Except that Schmidt was not sick. He simply did not call in. When Schmidt returned to work the next day white manager Tom Bresneham called him into the office and gave him an unexcused absence without him asking for it.

28. Schmidt came back and told me and the other employees on the shift in Meat and deli about what Bresneham had done for him. The black employees were outraged because Mathews and others had been terminated over this issue and Schmidt was given a break and not disciplined. It was later learned that manager Tom Bresneham had even called Schmidt at his home when he had failed to call in to remind him that he had not called in Breshneharn did give Schmidt without his asking an excused day. The whole shift complained. I and shop steward Robert Flint went to Lilly's office and filed a grievance. Giant transferred Breshneham but Giant never gave Maurice Mathews back his job. Breshneham's transfer did not resolve the problem. s

29. Mathews was told about the incident with Schmidt. At the time Mr. Mathews was still suspended pending an investigation. When Maurice Mathews had his grievance hearing on his termination all of this

information was presented to Bob Haywood, Eric Weiss and others at Giant but they all ignored the medical documentation and the incident with Schmidt.

30. Another incident in which Giant treated white employees more favorably was the incident involving David Machesney in the 1990's. I can recall in the 1990's when David Machesney got caught having sex with a female in his car. The female was caught with him in the car with her clothes off and it was on company time. Machesney is white. I was called in as the shop steward and represented him. The managers involved at the time was Giant manager Joe Cagliastro ("Joe C"). Dave was only off 2-3 days from work. He was given only a "Warning Notice". In Dave Machesney's hearing Joe C stated that they were going to give him another chance. Having sex on the parking lot after working hours was an automatic termination at Giant. Machesney brought the woman on Giant's parking lot in his van.

31. While Giant gave Dave Machesney a chance to keep his job they terminated Earl Parker who had probably over 20 years of service for simply driving Dave Machesney's van which had a beer bottle in it. This incident occurred in the 1990's. Earl parkers at the time of his termination was driving Machesney's van which Giant security stopped and checked. Machesney had a beer bottle in the van and Parker got terminated because of it. I represented Parker at his grievance hearing. Giant had no policy that allowed it to terminated Earl Parker. The vehicle Parker was driving did not belong to him and nor did the beer can. Parker was stopped going out of the gate and not coming into to the gate at Giant. Haywood told me and Parker in the grievance hearing that he did not care. Haywood terminated Parker. However, I observed quite a few white employees who had been caught with liquor and

were not terminated and one of those employees was Jerry Cushman.

32. I represented Jerry Cushman on almost everything he was charged with including when he brought a weapon on the Landover Warehouse compound in the 1990's. Cushman was charged with having a shotgun in the workplace. He lost no more than a couple of days from work. Bob Haywood and Eric Weiss were involved. Eric Weiss allowed Cushman to come back and never gave a reason. I have heard that there were some white guys in grocery who were allowed to go free for having weapons in the workplace as well.

33. Through the years I have observed Giant coerce employees into fabricating facts against another employee. I observed in 1988 Giant managers Debbie Lilly and Eric Weiss along with Giant Security force another African American named McFadden to lie and say that he had observed another black employee Michael Jones drinking in the Landover parking lot. Shop Steward Nathan Smith had a conversation with McFadden in 1988 which was taped by Union Local 730. The transcript of the conversation showed that McFadden admitted that he was instructed to lie by his superiors Eric Weiss and Deborah Lilly. I read the transcript. McFadden admitted that he had been forced by Weiss and Lilly to give a notarized statement to Giant alleging that Michael Jones was caught by him drinking on the parking lot. After that conversation with McFadden, Shop Steward Nathan Smith and I presented this taped conversation to Henry Hailstock another African American who was in charge of discrimination complaints at Giant as well. Hailsotck refused to do anything about the false statements, which were submitted against Michael Jones by Weiss and Lilly.

Later Giant fired Mr. McFadden. McFadden was told what to say in order to get Michael Jones fired. McFadden was sacred to come forward because he was afraid of loosing his job. However, McFadden eventually lost his job at Giant anyway.

34. I also observed Giant's mangers engage in racially hostile behavior in the workplace. I and other employees in the mid- to the late 1980's observed a hangman's noose in the Produce Department Office at the Landover warehouse. In 1988 the Landover Produce and Meat office were together. I recall on this particular day, the door to the office was open. When I and other employees entered the office we the hangman's noose. Employees accused managers Ron (last name unknown) and Jim Jacobie of making this hangman's noose. Employees filed complaints. Shop steward Nathan Smith filed a complaint. However, Giant did not have a hearing on any of the employees' grievances. Jacobie since has been promoted a number of times and is now in a top management job in Giant's Warehouses.

35. It is my understanding that Giant has alleged that it has a Committee that reviews the Distribution's Modified Duty Program. I have never heard of such a committee. Through the 41 years I have worked on Giant probably more than 50 % of the employees in the warehouse have a permanent injury of some kind. I and other employees at Giant have had and have observed others in the workplace sustain permanent partial injuries in the warehouse and retain their jobs in the warehouse as selectors, receivers, forklift operators and other warehouse positions. I have observed in the 1990's my white co-workers Willie Hindman and Paul Palmer sustain permanent partial injuries in Giant's Landover warehouse. I have observed Paul Palmer have quite a few injuries over a period of at least 3 years. I observed

my white co-worker Willie Hindman sit in the break room in 1996 on modified duty and he had a permanent injury. I observed white employees Chris Silva, Randy Sawyer, Ralph Palmer and Robert Stults perform modified duty with permanent partial injuries. I would see these white co-workers because they worked on the same shift as I but in the Produce Department. I saw white coworkers Fleming, Hindman and Silva upstairs in the break room for months. Fleming was in the break room at least 2-3 months. On modified duty. I saw Silva and Hindman approximately two years ago in the break room on modified duty with permanent injuries.

36. Giant's policy and the union contract allows an employee to be out for period one day shy of 2 years and still retain your seniority and job. The policy and practice at Giant is that that an employee must return before 2 years is up or loose their seniority.

37. Also the policy, pattern and practice and course dealing at Giant is that when an employee is returning from being on worker's compensation they need only bring their form 54. The employee is not required to seek permission to return or call and contact their supervisor advising them that they are going to return. The rule is that once you see your physician and released the employee has only 24 hours in which to return to work.

38. I was on worker's compensation for an injury to my thumb in 1996. I was out for approximately 6 months. When I was released by my doctor I did not call ahead of time. I simply showed up at work with my form 54 and medical release from my doctor. That is the way it has always been done at Giant. The policy is that an employee on Light/Modified duty cannot bid for a job or a temporary job but you are given credit for time

worked, which means it extends your tow (2) year time period in which you can be on worker's compensation. The 90 days light/modified duty is counted as retirement time.

39. I have observed in my 42 years at Giant that when white employees have returned on light or notified duty they have been allowed to sit down for 8 hours doing nothing.

40. I observed in the 1990's for approximately two years Giant allow my white co-worker Chris Silva who was on worker's compensation perform light/modified duty. His classification was a selector at the time. Nick Batiste and Tom Phillips allowed Silva to work as a Janitor and out of his classification for two (2) years. Silva did not lift anything other than a broom, bucket and a mop. Manager Marty Flaherty created a new policy that an employee could work out of his classification if they were on modified/ light duty. Manager Scott showed me a copy of the written policy. Silva was working the Deli Department. Employees complained that Silva was given an accommodation and offered a position outside of being a selector for two years.

41. The policy Flaherty created allowed employees with permanent disabilities to work outside of their classification and still keep their jobs in the warehouse. Recently Giant gave me a copy of the policy. Flaherty told me that the guys could do different jobs if they were physically disabled. Giant's policy allowed employees with disabilities to clean up, sweep under skids and move kids. They could do clean up jobs. I objected because the guys on light duty would be taking the jobs from the regular employees. The letter from Marty said it was okay and it was dated back to 1996.

42. Other incidents of unfair treatment is when I observed about ten (10) years ago a white employee named Phil Johnston suspended pending termination. At the time the policy was that an employee failing to punch in and punch out three (3) times in within a six-month period was terminated. Johnston had gotten his second warning notice and was suspended for three (3) days. In the grievance meeting in which I represented Johnston. Giant managers Joe C and Haywood changed the policy on the spot in the grievance hearing and made the policy four (4) times in six months. At the time I could not believe it. Haywood and Joe C gave Johnston his job by changing what they said was a Giant policy on the spot. To protect Johnston's job even further, manager Brian Lally got on the intercom everyday for six (6) months and reminded Phil Johnston near the end of his shift "Pill Johnston don't forget to sign out."

43. I also had the opportunity of representing David Newman on at least 3-4 grievances during the years at Giant. Additionally, when I worked in the meat and deli department in the 1980"s I observed how Mr. Newman was mistreated by managers Fred Fipps and Brian Lally. I observed Fipps allowing the entire shift to go home early after everyone including Newman had finished their work except for David Newman. Fipps would get on the loud speaker and tell the shift "everyone can go home except for David Newman." I also heard about Lally and Ralph Washington threatening employees not to associate with David Newman if they wanted to keep their jobs. I observed Lally cutting out our overtime to prevent Blacks from making more money. Lally would refuse to offer overtime when I was next in line to bid and get the overtime. There was a period in the 1980's when he stopped the entire shift from working overtime to ensure that I did not make anymore overtime.

44. Once I represented Mr. Newman in approximately in the early 1990's when Giant tried to fire him. On this particular occasion Newman had called in and asked for a day of f. He was granted a day off by manager Tony Rackewictz. When Mr. Newman got back to work both managers Tony Rackewicz and Brian Lally were looking for documentation for an emergency. However, at the time Mr. Newman did not have an emergency and he had leave on the books. Giant claimed that Mr. Newman had asked for an emergency day. Mr. Newman stated that he had not asked for an emergency day. Mr. Newman was suspended. He filed a grievance because this was his third incident of allegedly not having documentation for an emergency. Giant did not give Newman a hearing for at least 6 weeks on his suspension. When Giant did have a hearing Bob Haywood, Ollie Johnson and Brian Lally were present. At the meeting Lally was saying that Newman had requested time off because he had an emergency. However, Newman stated he only asked for a day off and there was need for him to bring documentation showing that he had an emergency. Haywood told Newman that he could not have his job back unless he signed a "Last Chance Letter." I advised against his signing the letter but Newman felt compelled to sign because he would not have had a job.

45. I also observed Brian Lally ask Newman if he had any white people in his family. Newman found the question offensive. I knew that Mr. Newman had complained about because he told me. I observed managers Keith Gardner and Ralph Washington watching and following Mr. Newman as he was selecting in the early 1990's. I was present at work and observed this happen to Mr. Newman. Other employees observed this as well.

46. Giant also had a way of retaliating against Blacks in the workplace for going anything it does not want them to do. I observed David Newman, Maurice Mathews. Ted Hines, Robert Adams and myself all testify for black employee William Stevenson in court sometime in the late 1980's. We were all told by Giant not to testify. All of us including myself got fired at least once after we testified for Stevenson in court in the late 1980's. Adams and Mathews lost their jobs completely and never returned to Giant. Adams had approximately 20 years and Mathews had over 25 years.

47. Through the years Giant was also aware of the racial graffiti in the warehouse and trailers. Giant management had knowledge of the racial graffiti in the trailers because I discussed this issue in the Joint Labor management meetings through the years. I spoke to Roger Olson and Eric Weiss and they did nothing about it.

48. I observed when Deborah Lilly, Director of the Fair Employment office at Giant showed up at one of our Joint Labor management Committee meetings in the mid 1980's. Many union shop stewards in the meeting loudly disagreed with Ms. Lilly's assertions that Giant was addressing the issue of race discrimination in the warehouse. Many of us disagreed that there was any fair employment commitment by Giant. The discussions became heated and Lilly claimed she had never known about any problems in the warehouse. I don't' recall Lilly every coming back to the JLM meetings except for that one time. Many employees never knew about Giant's Fair Employment Office because Giant did not post the signs until after the warehouse. I knew because Lilly showed up in the meeting.

49. Another incident of unfair treatment of Blacks in the warehouse was when in the early 1990's white manager Bob Hines, Scooter Hoyle's brother-in law kicked Robert Adams a black employee in the middle of his butt. I remember Robert Adams filed a grievance with the union and I represented him. The kick was so hard it injured Adams' spine. Manager Bob Hines stayed at Giant and never got fired. After about two years after the incident Hines resigned. I also recall when white manager Bob Caldwell grabbed Tyrone Diggs in the collar. Diggs filed a grievance. I represented Tyrone in the early 1980's as to this matter. Managers Haywood and Joe C were in the grievance meeting and they did nothing to Caldwell. I experienced being assaulted at Giant by a white inspector. In the 1970's white co-worker Hewitt (spelled as sounds) was an egg inspector, at the time I selected the wrong eggs. Hewitt was standing by as I was selecting eggs. At the time Giant graded its eggs and meats. The best eggs and meat went to the white neighborhoods and the worst eggs and meat white to the black and low-income neighborhoods. Hewitt saw that I sent the eggs in the wrong neighborhood and grabbed me in the collar because I had selected the wrong eggs. Joe C had to tell Hewitt to get his hands off of me. In the meetings we disagreed with Giant on how they would not discipline the managers especially when the mangers were assaulting the employees in the workplace. Giant's only action was to transfer the manager from department to department. Giant took the position that the union could not tell them how to discipline their managers. Through the 42 years I worked at Giant, the company never disciplined the managers in the warehouse for assaulting blacks. Giant managers assaulted Black employees often in the workplace.

50. During my 42 years at Giant I was a roving shop steward and I represented employees from department to department. I observed that employees called white coworker Doug Randall "mighty whitey". He has worked about 10 years at Giant and he can do whatever he wants he gets whatever he wants. Doug Randall still works at Giant. He walks around as if he owns the joint. He works in the meat and deli department. I and other staffers have observed Randall come into the workplace drunk and Giant management does not do anything to discipline him nor have they tested him for drugs and alcohol abuse.

51. Other white employees who are not disciplined is Paul Hartman. Hartman was accused of trying to run a Black manager Mr. Washington over with a power jack. Washington suspended Hartman in the early 1990's for his actions. Eric Weiss of Giant's Labor Relations Department in the grievance meeting when I represented Hartman. It was the first time I saw Giant take the side of the employee over a manager. However, Hartman was white and Washington was Black. Weiss said that Hartmen had done nothing wrong and that he believed Hartman. Union President Roosevelt Murray was also in the meeting. Weiss' last words to Washington were that Hartman did not try to run you over with a Jack and then said the meeting was over. Weiss defended Hartman against Washington who was Black and part of Giant's management staff. I have observed that when white managers had no witnesses to an incident Giant always took the word of a white manager over a black employee. Roosevelt Murray was startled by Weiss's position and comments. Hartman was the son of one of Giant's buyers who appeared regularly on TV. He was a produce buyer. Weiss protected Hartman's job. This was the first time I

observed how Giant truly treated its black managers compared to its white managers.

52. All of the above events and incidents are just a small sampling of what I observed in the workplace as to how African American employees were treated at Giant.

I RUDY BROWN HEREBY SWEAR AND AFFIRM UNDER THE PENALTY OF PERJURY THAT THE FOLLOWING DECLARATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Date: 9/6/01

RUDY BROWN

To whom it concern: 1-22-89

I don understand all in this letter, and is true, to the best of my knowledge. It is common for employees to eat merchandise when damage, and sometime not damage. The managers are fully aware of the employees eating. Managers were unconcerned about cut damage, and sometime good merchandise being eating. No manager came up and authorized each employee to eat. The employee to eat because it has been accepted by the management until 1-5-89. 3 names of 2 Shop Stewards and 1 former SS, Nathan Smith Chester Wortham Telephone No. 341-4135. Randy Logan.

1	/s/	15	/s/	29	/s/
2	/s/	16	/s/	30	/s/
3	/s/	17	/s/	31	/s/
4	/s/	18	/s/	32	/s/
5	/s/	19	/s/	33	/s/
6	/s/	20	/s/	34	/s/
7	/s/	21	/s/	35	/s/
8	/s/	22	/s/	36	/s/
9	/s/	23	/s/	37	/s/
10	/s/	24	/s/	38	/s/
11	/s/	25	/s/	39	/s/
12	/s/	26	/s/	40	/s/
13	/s/	27	/s/	41	/s/
14	/s/	28	/s/	42	/s/

GIANT FOOD INC.
BOX 1804, WASHINGTON, D.C. 20013

January 27, 1989

Mr. Roosevelt C. Murray
Secretary-Treasurer & Business Agent
Warehouse Employee Local Union No. 730
2001 Rhode Island Avenue, N.E.
Washington, D.C. 20018

Dear Mr. Murray:

This letter will serve to confirm our agreement regarding the full and complete settlement of all matters related to the discharge of Adolph Brown.

It is the mutual understanding of Giant, Mr. Brown and Local 730 that the following terms and conditions will settle and finally resolve between and among all parties any and all disputes, grievances, complaints or claims related to Mr. Brown's employment, suspension or termination.

1. Mr. Brown will be permitted to return to work with full seniority as of Tuesday, January 31, 1989, with all time off resulting from the incident of January 5, 1989 (wherein Mr. Brown violated Giant policy by consuming goods without authorization), being considered a suspension without any form of compensation.

2. In light of the Union's position that the Company Policy on the consumption or use of Company property or merchandise has not been universally communicated throughout the Distribution Centers, a notice or other summary the Company's policy will be posted or otherwise distributed so that all employees are notified

of this policy and there will be no future confusion or claims of ignorance of the rules.

3. The settlement of this case will not be considered a compromise of the Company's position that all pilferage, theft or unauthorized consumption of a product is a dischargeable offense. No reference will be made to this case or settlement in any other pending or future case, and it will not be a precedent of any kind.

4. Finally, should Mr. Brown violate this policy in the future, he will be discharged without recourse via the grievance procedure set forth in the labor contract

If I have accurately reflected the terms of our agreement, please sign in the appropriate location below.

Sincerely,

Eric D. Weiss
Director
Labor Relations

FOR THE UNION

FOR THE GRIEVANT

EDW: smg

January 30, 1989

MEMORANDUM

TO: All Distribution Division Associates

FROM: Sam Thurston

SUBJECT: Unauthorized Use, Possession, Pilferage, Destruction, or Consumption of Company Property or Merchandise

1. The use, possession, pilferage, destruction or consumption of any company property which is not expressly authorized in writing by your manager is strictly prohibited and will result in discharge. It is the associates responsibility to secure prior written, authorization from their manager. Failure to do so will be a violation of this policy.

2. This prohibition includes, but is not limited to:

a. Intentionally damaging or unnecessarily opening any container or product.

b. Concealing goods or removing merchandise to a place to be removed, used or consumed at a later time.

c. Eating, drinking, or otherwise consuming or using any food, product or merchandise even if it is damaged, spoiled, or otherwise, not fit for sale.

d. Consuming or using product which has been cut or opened for quality control inspection:

NOTE:No food or drink should be consumed in warehouses, but should be confined to breakrooms or

other authorized areas. Eating or drinking outside these authorized areas causes sanitation problems and may cause unnecessary suspicion

SET: mad

Discrimination of a Shop Steward.

When the condition and scope of my case is supposed to be private and personal such as not receiving any compensation for my time off was posted in all local 730 Giant Warehouses. There is something wrong with management when they suspend an employee for three weeks and 2 days for a policy that was not posted, until after the incident was, three weeks old. I asked for a policy statement regarding eating and drinking wasted and/or unwasted merchandise–there was none present at the First Step or the Second Step Hearings that were held. Also in the produce department, 79 employees acknowledged the fact that prior to my incident, the eating of wasted and/or unwasted merchandise without authorization was common place and accepted by the management with knowledge. Something is wrong when unnecessary negotiations must take place between management and union officials in order for a union employee/member to be returned to his job when there is no policy broken. The legality of side-agreements and member rights violations are stipulated and clear under Article 25; in short such agreements, written or verbal are not legal.

To summarize:

The Company never had a Warehouse policy for local 730 Giant Food Warehouse Employees relative to the eating of wasted/unwasted merchandise.

My suspension regarding the above took place on January 5, 1989 and a written notice was not posted regarding such a policy until January 30, 1989. Therefore, since no policy was legally binding prior, to January 30, 989; my suspension was not legal or binding

and I am entitled to receive pay equal to three weeks plus days.

Rudy Brown, Shop Steward

Civil No. JFM-98-3565

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RAQUIB A. MUHAMMAD, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

MEMORANDUM

Six plaintiffs, Raquib A. Muhammad, Ronald A. Evans, Darnell Hart, Daniel E. Johnson, III, Linda A. Jones, and Myra B. Jones have instituted this action against Giant Food, Inc., and several of its executives and managers, for employment discrimination. Plaintiffs have sought certification of a class of allegedly similarly situated employees. Discovery has been completed, and defendants have moved for summary judgment as to the claims asserted by each of the plaintiffs. Defendants also oppose class certification.

I am today issuing six separate opinions granting Giant's motions for summary judgment. fn1 This opinion addresses the procedural issues pertaining to the request for class certification and the defenses particular to the individual defendants. fn2 In addition, plaintiffs Amended Motion For Enlargement of Time And For Other Appropriate Relief is granted.

I.

Fed. R. Civ. P. 23(c)(l) dictates that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by

order whether it is to be so maintained." The Fourth Circuit has stated that "[t]he language of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the merits.'" Nance v. Union Carbide Corp., 540 F.2d 718, 723 n.9 (4th Cir. 1976) (citations omitted), vacated on other grounds, 431 U.S. 952 (1977). The Nance language was, however, dictum. It merely supported the court's holding that the plaintiff had not brought a class action since he had not given any notice of it before the decision on the merits. Id. at 722-25. That is not an issue in the present case since the plaintiffs stated class claims in their complaint and sought class certification from the outset.

Other courts that have considered this question under similar facts have held that it is appropriate to decide summary judgment motions before ruling on class certification. See. e.g., Cowen v. Bank United of Texas, 70 F.3d 937, 941-42 (7th Cir. 1995); Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984); Thornton v. Mercantile Stores Co., 13 F. Supp. 2d 1282, 1289-90 (M.D. Ala. 1998); Hyman v. First Union Corp., 982 F. Supp. 8, 11 (D.D.C. 1997). Rule 23(c)(1), as amended in 1966, sought to avoid the problem of "one-way intervention," by which putative class members strategically "sit on the sidelines" to avoid an unfavorable ruling on the merits or wait until a favorable ruling before joining the class. Newton v. Southern Wood Piedmont Co., 163 F.R.D. 625, 629-30 (S.D. Ga. 1995); Hyman, 982 F. Supp. at 11. A defendant may waive this protection, thus avoiding the costs of defending a class action, by filing a motion for summary judgment as to individual claims before certification. Cowen, 70 F.3d at 941; Wright, 742 F.2d at 544; Thornton, 13 F. Supp. 2d at 1289-90; Hyman, 982 F. Supp. at 11.

Moreover, where the plaintiffs' claims lack merit, requiring the publication of notice, should the class be certified, wastes expense. Marx v. Centran Corp., 747 F.2d 1536, 1552 (6th Cir. 1984); Allen v. Aronson Furniture Co., 971 F. Supp. 1259, 1261 (N.D. Ill. 1997).

In accordance with these authorities, I am in logical precedence deciding the summary judgment motions before deciding the class certification motion. Since I am granting the summary judgment motions in all respects, I find that the certification motion is moot. Floyd v. Bowen, 833 F.2d 529, 535 (5th Cir. 1988); Thornton, 13 F. Supp. 2d at 1289-90; Hyman, 982 F. Supp. at 14; Allen, 971 F. Supp. at 1263. fn3

II.

Plaintiffs have asserted claims against the Individual Defendants under 42 U.S.C. §§ 1981, 1985(3), and 1986.

A.

The Fourth Circuit has held that the elements of a section 1981 claim are largely the same as a Title VII claim. Gairola v. Virginia Dep't of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985). Plaintiffs can prove intentional discrimination under section 1981 using either direct evidence or the flexible burden shifting scheme established by McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973); see also Callwood v. Dave & Buster's Inc., 98 F. Supp.2d 694, 704

(D. Md. 2000).

In this case, plaintiffs have not produced any direct or circumstantial evidence, under McDonnell Douglas, of racial discrimination by the Individual Defendants. In

fact, plaintiffs only made one reference to any evidence in their Opposition. In footnote 26, plaintiffs state, "Plaintiffs incorporate by reference the entire record and exhibits and evidence that has been previously submitted in the record as a whole in support of their opposition."

To survive summary judgment, plaintiffs "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added); see also Causey v. Balog, 929 F. Supp. 900, 910 (D. Md. 1996) ("~T]he non-movant is required to identify specific evidence in the record, and to articulate the precise manner in which that evidence support~s] their claim.") Plaintiffs have completely failed to provide any specific evidence showing discrimination under section 1981 by the Individual Defendants. As a result, summary judgment is appropriate in favor of the Individual Defendants on the section 1981 claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Drewitt v. Pratt, 999 F.2d 774, 778 (4th Cir. 1993).

B.

To establish a claim under section 1985(3), the plaintiffs must show: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based invidiously discriminatory animus to (3) deprive plaintiffs of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiffs as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. See Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995).

First, as stated above, the Individual Defendants are entitled to summary judgment because the plaintiffs have failed to site any specific evidence in their

Opposition. See Simmons, 47 F.3d at 1376 (conspiracy can not be proven using conclusory allegations).

Second, even if plaintiffs had cited specific evidence, the Individual Defendants would be entitled to summary judgment because plaintiffs cannot show a conspiracy of two or more persons. The Fourth Circuit has held that, under the intracorporate conspiracy doctrine, a corporation cannot conspire with itself. Buschi v. Kirven, 775 F.2d 1240, 1251 (4th Cir. 1985) (extending this doctrine to civil rights cases); Boyce v. Fleet Finance, Inc., 802 F. Supp. 1404, 1410 (E.D. Va. 1992) (noting doctrine's limits). But cf. United States v. Hughes Aircraft 20 F.3d 974, 979 (9th Cir. 1994) (noting circuit split on extending this doctrine to civil rights cases). Further, the acts of a corporation's agents, such as employees, are considered the acts of the corporation. See Buschi, 775 F .2d at 1251. Therefore, employees of a corporation cannot conspire with themselves. id.

The Individual Defendants in this case were all employees of Giant. The plaintiffs have not suggested any reason why the doctrine should not be applied here. As a result, plaintiffs cannot show a conspiracy between two or more persons under the intracorporate conspiracy doctrine.

C.

Section 1986 provides a claim against a party who knows of a section 1985(3) conspiracy and who fails to prevent the conspiracy. Therefore, section 1986 claims are dependent on section 1985(3) claims. See Langworthy v. Dean, 37 F. Supp.2d 417, 425 (D. Md. 1999). Because the plaintiffs cannot assert a section

1985(3) claim against the Individual Defendants, they cannot state a section 1986 claim.

III.

The Individual Defendants also request clarification as to whether Count IV of the Amended Complaint has been dismissed. The confusion arises because there are two Count IV's in the Amended Complaint, ("second Count IV") was dismissed. In the alternative, they request summary judgment on that count.

The issue is also somewhat confused because the second Count IV is, in part, duplicative of Count II. Count II asserts claims against Giant and the individual defendants for violations of Title VII and the Thirteenth Amendment. Se U.S. Const amend. XIII. The second Count IV asserts claims against Giant and the individual defendants under Title VII. The plaintiffs voluntarily dismissed the Title VII claims against Deborah Lilly, Nicholas Sacchetti, and Robert Schoening in Count II. See Voluntary Dismissal (June 29, 1999). The Court dismissed the Title VII claims against Pete Manos. See Order (March 6, 2000).

The Title VII claims asserted against the Individual Defendants in the second Count IV are the same as the Title VII claims in Count II. Because the claims in Count II have been dismissed either voluntarily or by order, the identical claims in the second Count IV are dismissed.

Date: November 27, 2000

J. Frederick Motz
United States District Judge

Footnotes

fn1 I am directing that the Clerk open five new cases in the names of the five plaintiffs other than Raquib A. Muhammad, the lead plaintiff in this action. These files are being opened for administrative purposes. In effect, this action has devolved into six separate employment discrimination actions that should be counted as such for measuring the court's workload under the measurement standards promulgated by the Administrative Office. Plaintiffs are not being required to pay a separate filing fee for these five new actions.

fn2 Of course, in addition, the Individual Defendants are entitled to summary judgment for the same reasons I am granting summary judgment in favor of Giant in my separate opinions.

fn3 I might note that if I were to consider the motion for class certification on its merits, I would deny it. In light of my rulings that none of the plaintiffs have cognizable claims, I would not find such claims to be typical of the claims of the purported class members. Nor would I find these plaintiffs to fairly and adequately protect the interests of the class since they themselves have no incentive to proceed. Thus, at least two of the prerequisites to a class action established by Rule 23(a) are not established. Moreover, as the summary judgment opinions I am entering reflect, the facts underlying the claims of the individual plaintiffs vary greatly. Therefore, I would not find that the questions of fact common to the members of the class predominate over questions affecting only individual members as required by Rule 23(b)(3).

Civil No. JFM-98-3565

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RAQUIB A. MUHAMMAD, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

ORDER

For the reasons in the two memoranda entered herewith, it is, this 27th day of November 2000

ORDERED

1. Plaintiffs' motion for class certification is denied;

2. Defendants' motions for summary judgment are granted; and

3. Judgment is entered in favor of defendants against Raquib A. Muhammad.

J. Frederick Motz
United States District Judge

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

ORDER

A hearing was held in open court on May 23, 1997, to address the defendants' motions to dismiss. I made several oral orders at that hearing which I now reconfirm in this order to clarify the record. I am issuing a supplemental memorandum and order herewith regarding my ruling on defendants' motions seeking dismissal on the ground that plaintiffs must arbitrate their federal statutory claims under collective bargaining agreements between their unions and Giant Food, Inc.

For the reasons enumerated in open court on May 23, 1997, it is this 7th day of August, 1997,

ORDERED that defendants' motions to dismiss be granted in part and denied in part, as follows:

1. Defendants' motion to dismiss with prejudice plaintiffs' Equal Pay Act claims is granted;

2. Defendants' motion to dismiss with prejudice plaintiffs' claims based on Executive Order No. 11246 is granted;

3. Defendants' motion to dismiss plaintiffs' Title VII and Age Discrimination in Employment Act ("ADEA") claims and plaintiff Qualls' Americans With Disabilities Act ("ADA") claim for failure to pursue allegedly binding arbitration pursuant to collective bargaining agreements is denied;

4. Plaintiff Blocker is granted limited discovery to show why defendants' motion to dismiss his ADA claim should not be granted for failure to pursue arbitration pursuant to his collective bargaining agreement;

5. Defendants' motion to dismiss plaintiffs' claims because the Equal Employment Opportunity Commission issued "early" right-to-sue letters is denied;

6. Defendants' motion to dismiss plaintiffs' Title VII, ADA, and ADEA claims against individual defendants Manos, Thurston, Haywood, Myers, Lilly, Maynard, and Balodemas is granted;

7. Regarding the individual plaintiffs' claims, the following rulings are made without prejudice to defendants' renewing their arguments on these issues in a motion for summary judgment:

a. Defendants' motion to dismiss plaintiff Mathews' ADEA claim as untimely filed is granted;

b. Defendants' motion to dismiss plaintiff Qualls' ADEA claim is granted, but plaintiff Qualls is granted leave to amend to clarify his claim;

c. Defendants' motion to dismiss plaintiff Blocker's retaliation claim is denied;

d. Defendants' motion to dismiss the claims of plaintiffs Mungro, Newman, Skipper, and Ingram as untimely filed is denied;

8. Defendants' motion to dismiss plaintiffs' 42 U.S.C. § 1981 claims against defendant Maynard is granted;

9. Defendants' motion to dismiss plaintiffs' 42 U.S.C. § 1981 claims against defendants Manos, Thurston, Haywood, Myers, Lilly, and Balodemas is denied;

10. Defendants' motion to dismiss plaintiffs' 42 U.S.C. §§ 1985 & 1986 claims is granted;

11. Defendants' motion for the court to decline to exercise supplemental jurisdiction over plaintiffs' state law claims is denied; and

12. The deadline for discovery regarding the merits of plaintiffs' individual claims and class certification issues is January 31, 1998. The deadline for motions for summary judgment and class certification will be forty-five (45) days later, or Monday, March 16, 1998.

J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBER OF
J. FREDERICK MOTZ
UNITED STATE
DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND
21201
(410) 862-0782
FAX (410) 962-2698

April 23, 1999

Memo To Counsel Re: Muhammad v. Giant Food, et al.
Civil No. JFM-98-3565

Dear Counsel:

This will confirm the schedule set during the conference held yesterday. (Unfortunately, Mr. Butsavage's name does not appear on the docket, and he did not receive notice of the conference. If he has any objection to the proposed schedule, I ask him to so advise me on or before May 4, 1999.)

May 7, 1999	Deadline for defendants to file recast motions to dismiss and/or for summary judgment citing Fourth Circuit law and for all the individual defendants to file motions to dismiss
June 4, 1999	Deadline for plaintiffs' opposition
June 18, 1999	Deadline for defendants' reply
November 12, 1999	Deadline for plaintiffs to make Rule 26(a)(2) disclosures

January 14, 2000	Deadline for defendants to make Rule 26(a)(2) disclosures
February 11, 2000	Deadline for plaintiffs to make rebuttal Rule 26(a)(2) disclosures
March 31, 2000	Discovery deadline
May 12, 2000	Deadline for defendants to file summary judgment motion and for plaintiffs to file class certification motion
June 9,2000	Deadline for plaintiffs to file opposition to defendants' summary judgment motion and a cross-motion for summary judgment and for defendants to file opposition to plaintiffs' class certification motion
June 30, 2000	Deadline for defendants to file opposition/reply summary judgment motions and for plaintiff to file a reply class certification motions
July 14, 2000	Deadline for plaintiffs to file a reply (if they have filed cross-motion for summary judgment)

This will also confirm that (1) discovery should proceed forthwith as to plaintiffs' discrimination claims against Giant (but not as to any claims as to which motions to dismiss and/or for summary judgment have been filed), (2) I will deny the pending motions filed by defendants without prejudice to them being refiled in accordance with the schedule set forth in the letter, and (3) plaintiffs

may be filing new actions on behalf of additional plaintiffs that they will seek to consolidate with this action.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz United States District Judge
cc: Court File

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBER OF
J. FREDERICK MOTZ
UNITED STATE
DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND
21201
(410) 862-0782
FAX (410) 962-2698

February 20, 2002

Memo to Counsel Re: Gregory Carson, et al. v. Giant Food, et al. Civil No. JFM-96-2882

Dear Counsel:

I have reviewed the papers submitted in connection with plaintiff's motion for sanctions against Giant for Giant's failure to provide complete information during discovery.

I have concluded that Giant should reimburse Plaintiffs in the amount of $25,000. In making this ruling, I am not finding that Giant failed to act in good faith by initially submitting incorrect data. Nevertheless, it seems to me that a cost shifting is appropriate since it is clear that Plaintiffs were put to additional expense by Giant's mistake. The record establishes that an additional $8,000 was spent on Dr. Zellner's first report that would not have been incurred if Giant initially submitted the correct data. Likewise, a second report would have been unnecessary. However, since the production of full and complete data by Giant in the first instance presumably would have increased to some extent the cost of the first report, I am deducting $2,364.00 from the $19,364.00 claimed by plaintiffs for preparing the second report.

Despite the informal natural of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz
United States District Judge

cc: Court File

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,
Plaintiffs,

v.

GIANT FOOD, INC., ET AL.,
Defendants.

ORDER

As stated in the accompanying memorandum to counsel, it is, this 20th day of February 2002

ORDERED

1. Plaintiffs' renewed motion for sanctions is granted; and

2. Giant is directed to pay $25,000 to Plaintiffs.

J. Frederick Motz
United States District Judge

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON

v.

GIANT FOOD, INC., ET AL.

MEMORANDUM

By a letter dated February 24, 2002, plaintiffs have informally requested this court to alter and amend its ruling in the letter order dated February 20, 2002, awarding plaintiffs $25,000 for work done by Dr. Harriet Zellner that would not have had to be performed but for a mistake made by defendant Giant Food in compiling statistical information that was forwarded to Dr. Zellner.

First, plaintiffs ask that the amount of the award be increased by $16,075 because of attorney fees and costs that three of the plaintiffs (Messrs. Carson, Newman, and Blocker) incurred in obtaining the $25,000 award. I previously ruled that plaintiffs should not be compensated for these attorney fees and costs. I adhere to that ruling. As I previously stated, Giants mistake was entirely inadvertent. Moreover, if plaintiffs had handled this issue in a responsible manner, their attorney fees and costs would have been negligible.

Second, plaintiffs' counsel requests that the $25,000 be award not to all the plaintiffs but only to three of them, Messrs. Carson, Newman, and Blocker, under the theory that they were the only plaintiffs to pay the additional costs. The record demonstrates that at

least on other plaintiff in this case, Mr. Mungro, has asserted a claim for reimbursement from the $25,000. Moreover, it also appears from the record that some or all of the plaintiffs in the related Muhammad litigation may also have valid reimbursement claims. Finally, based upon the February 24, 2000 letter, it appears that plaintiffs' counsel may also have contemplated being paid $16,075 for attorney fees and costs out of the award although the award expressly was for fees paid to Dr. Zellner in connection with preparing two statistical reports.

Based on the record before me, it seems that plaintiffs' counsel is confused as to the basis of the $25,000 award. $8,000 was awarded for additional expenses associated with Dr. Zellner's first statistical report. $17,000 was awarded for additional expenses associated with Dr. Zellner's second statistical report. It is unreasonable to argue that only Messrs. Carson, Newman, and Blocker paid Dr. Zellner for the overpayments that have been awarded. Numerous plaintiffs in Muhammad and Carson contributed to the total costs of the two reports.

I have determined that the most efficient and fair way to administer the $25,000 is to place upon plaintiff's counsel, Jo Ann P. Myles, Esq., the responsibility to compute each plaintiff's share of the award. fn1 Ms. Myles is to determine the proportional contribution of each plaintiff, whether a Muhammad plaintiff or a Carson plaintiff, to each report, and then determine based upon that calculation, the amount of reimbursement each plaintiff is entitled to. For example if Plaintiff A contributed ten percent of the cost of the first statistical report, he is entitled to ten percent of $8,000 ($800). If Plaintiff B contributed seven percent to

the cost of the second statistical report, he is entitled to seven percent of $17,000 ($1,190).

Ms. Myles is directed to submit her computations to the court, sending copies to counsel for Giant and to Mr. Mungro on or before April 26, 2002. If either Giant or Mr. Mungro have any objections to the calculations, they should file their objections on or before May 10, 2002. If no objections are filed, Giant should then issue separate checks to each plaintiff in the amount shown on Ms. Myles' computation sheet.

Date: April 2, 2002

J. Frederick Motz
United States District Judge

Footnotes

fn1 None of the $25,000 should be paid to Ms. Myles. Nor should any of the award be paid to Dr. Zellner in connection with her costs related to preparing material in support of plaintiffs' renewed motion for sanctions.

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

ORDER

For the reasons stated in the accompanying memorandum, it is, this 2nd day of April 2002

ORDERED

1. The clerk is directed to file the attached February 24, 2002 letter from plaintiffs' counsel to the court as a motion to alter and amend the ruling made by the court as a motion to alter and amend the ruling made by this court on February 20, 2002;

2. The motion is denied; and

3. The $25,000 award should be paid in accordance with the procedure set forth in the accompanying Memorandum.

J. Frederick Motz
United States District Judge

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

ORDER

Upon consideration of plaintiffs' motion to alter and amend the court's order dated October 11, 2002 and to correct the docket sheet, it is, this 21st day of November 2001

ORDERED that said motion be denied.

J. Frederick Motz
United States District Judge

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC., ET AL.,

ORDER

Upon consideration of plaintiff's motion to Correct the Docket Sheet and District Court Record and defendants' opposition thereto, it is, this 18th day of June 2002

ORDERED that the motion be denied.

J. Frederick Motz
United States District Judge

CASE No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,
Plaintiffs,

v.

GIANT FOOD, INC., ET AL.,
Defendants.

PLAINTIFFS' PROPOSED ORDER FOR ENTERING DISCOVERY PLAN AND SCHEDULE FOR DETERMINATION OF INDIVIDUAL AND CLASS ISSUES AND TRIAL

Pursuant to Rules 23(d) and 26(f) of the Federal Rules of Civil Procedure, this Order being entered to establish a discovery plan and schedule for determination of class issues and trial. fn1

Date:

2/17/97 Documents requests start

3/397 First installment of internal memoranda and reports evaluating LEO and union grievances and personnel records at Giant, regular and irregular statistical reports regarding EEO data, fn2 and internal memoranda and reports evaluating Giant's performance under its affirmative action plan (hereinafter "Designated Document") from the files of Giant's Human Resources:

	Group, Labor Relations, Fair Employment Office and Personnel Office.
	Giant's Human Resources Group fn3, Labor Relations, Fair Employment Office and Personnel Office. 1996 EIS and HRIS data bases in a form consistent with bases produced for prior years, and any necessary explanatory documentation. fn4
4/14/97	Application Flow
5/19/97	Second installment of Designated Documents from the Human Resources Group, Labor Relations, Personnel Office and Fair Employment Office.
6/1697	Third installment of Designated Documents from the Human Resources Group, Labor Relations, Fair Employment Office and Personnel Office
6/30/97	If plaintiffs believe further production is necessary they may file new document requests fn5 No new document requests are to be filed by Plaintiff until June 26, 1991.
7/30/97	First installment of Designated Documents from groups other than Giants Human Resources Group, Labor Relations, Personnel Office and Fair Employment Office
8/26/97	Second installment of Designated Documents from groups ether than Giant's Human Resources Group. fn6

9/3/97 - 1/15/98	Depositions Phase I. Parties may take depositions.
2/17/98	Plaintiffs' motion for class certification due.
2/17/98- 8/17/98	Depositions Phase II. Parties may take depositions.
6/15/98	Giant's opposition to Plaintiffs' motion for class certification due.
6/15/98	Plaintiffs may conduct additional discovery necessary to prepare their reply
8/17/98	Plaintiffs' reply to Giant's opposition.
8/17/98	Plaintiffs' reply to Giant's opposition to class certification due.
8/18/98- 12/4/98	Any additional discovery to prepare for Trial
10/1/98	Non-Evidentiary Hearing on Class Certification.
10/24/98	Evidentiary Hearing on class certification (if needed).
12/17/98	Panics' Pretrial Statements to be filed in accordance with Local Rule 209(b)
1/20/99	Liability trial commences.

SO ORDERED

Dated:

United States District Judge

cc: Jo Ann Myles, Esquire
8201 Corporate Drive, Suite 620
Landover, Maryland 20785

Xavier Aragona, Esquire
6009 Oxon Hill Road, Suite 200
Oxon Hill, Maryland 2074

Mazy Todd, Esquire
Laureen Mullins, Esquire
Street, N.W., Suite 304
Washington, D.C. 20006

Robert B. Fitzpatrick, Esquire
Fitzpatrick & Associates
1375 Connecticut Avenue, N.W. Suite 1140
Washington, D.C. 20009-5728

Footnotes

fn1 Under this order, no discovery is to be permitted during the time period covered by the Order, except as provided herein.

In addition, except as otherwise permitted herein, if either party finds that they need more time to comply with their obligations under the Plan and Schedule, they may, upon a showing of good cause, move the Court for an extension of time and for any appropriate adjustments in the remaining dates in the Plan and Schedule.

fn2 The statistical response to be produced are to consist of (a) those regular statistical reports designated by plaintiffs' counsel in Exhibit A attached, including

applicant flow reports and (b) any occasional irregular statistical reports relating to EEO that are in the exercise of reasonable good faith efforts to search for Designated Documents.

fn3 The search for these documents will be conducted in the following ten departmental areas chat comprised the Human Resources Group (1) Equal Opportunity Program, (2) Employment, (3) Compensation, (4) Industrial Relations, (5) Employee Benefits (6) Organization Development (7) Employee Services, (8) Medical (9) Corporate Safety, (10) the Office of the Vice President Human Resources, (11) Labor Relations, (12) Fair Employment Office, and (13) Personnel Office.

fn4 To the extent documents exist, the dates far production for all documents covered by the order is April, 1978 through December 1995, without prejudice to requests for supplementation from later time periods, except that the computerized data bases described in this Plan and Schedule will be [provided up through 1995.

Documents withheld by wither on the grounds of privilege, work product or having been prepared in anticipation of litigation or trial, are to be indexed and identified for opposing counsel.

Fn5 If such requests are filed, the Court will consider whether adjustments to the remaining dates in the Plan and Schedule are necessary.

The Court will not impose a requirement of judicial screening of all requested discovery, because the court intends to continue conducting status conferences every 2 weeks at which specific objections and problems can be raised orally. Effective immediately, counsel for

individual Plaintiffs shall no longer be required to appear at the status conferences. Proposed counsel shall endeavor keep counsel for individual Plaintiffs informed of developments, and individual counsel may appear at any scheduled status conferences when they have an issue to raise affecting their clients.

fn6 It is possible that Giant will need more than the time provided to search for and produce responsive documents from all if its groups, If this is the Case, Giant is to inform Plaintiffs,, by July 25, 1997, how much additional time, if any will be required for it to complete its production of Designated Documents. If additional time is needed, the remaining dates in the Plan and Schedule may be adjusted.

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC, ET AL.,

SCHEDULING ORDER

In accordance with the rulings I made during the hearing held on March 3, 2000, the schedule in this case is hereby modified as follows:

March 31, 2000	Deadline for plaintiffs to make Rule 26(a)(2) disclosures, except for the disclosures regarding the statistical analysis of Giant's workforce
April 28, 2000	Deadline for defendants to make Rule 26(a)(2) disclosures, except for the disclosures regarding the statistical analysis of Giant's workforce
May 5, 2000	Deadline for plaintiffs to make Rule 26(a)(2) disclosures regarding the statistical analysis of Giant's workforce
May 12, 2000	Deadline for plaintiffs to make rebuttal Rule 26(a)(2) disclosures, except for the disclosures regarding

	the statistical analysis of Giant's workforce
May 19, 2000	Deadline for defendants to make Rule 26(a)(2) disclosures regarding the statistical analysis of Giant's workforce
June 2, 2000	Deadline for plaintiffs to make rebuttal Rule 26(a)(2) disclosures regarding the statistical analysis of Giant's workforce
July 15, 2000	Discovery deadline
Sept. 11, 2000	Deadline for defendants to file summary judgment motions and for plaintiffs to file class certification motion
Nov. 6, 2000	Deadline for plaintiffs to file opposition to defendants summary judgment motions and a cross-motion for summary judgment and for defendants to file opposition to plaintiffs' class certification motion
Dec. 4, 2000	Deadline for defendants to file opposition/reply re summary judgment motions and for plaintiffs to file a reply class certification motion
Dec. 18, 2000	Deadline for plaintiffs to file a reply (if they have filed cross-motion for summary judgment)

March 21st, 2000

J. Frederick Motz
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing the Giant Defendants' Opposition to Plaintiffs' "Motion for Appropriate Relief and to Have the Court Enter the Attached Proposed Scheduling Order" was served this 22nd day of March 2001, via FedEx on the following counsel of record;

Jo Ann P. Myles, Esq.
Law Offices of Jo Ann P. Myles
1300 Mercantile Lane
Suite 139-S
Largo, MD 20774

Civil No. JFM-96-2882

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREGORY CARSON, ET AL.,

v.

GIANT FOOD, INC, ET AL.,

SCHEDULING ORDER

In accordance with the rulings I made during the scheduling conference held on March 23, 2001, the schedule in this case is hereby modified as follows:

June 1, 2001	Deadline for defendants to file summary judgment motions
June 29, 2001	Deadline for plaintiffs to file class certification motion
August 31, 2001	Deadline for plaintiffs to file opposition to defendants' summary judgment motions and cross-motion(s) for summary judgment and for defendants to file opposition to plaintiffs' class certification motion
October 26, 2001	Deadline for defendants to file opposition/reply it summary judgment motions and for plaintiffs to file a reply class certification motion

November 16, 2001 Deadline for plaintiffs to file a reply (if they have filed cross-motion(s) for summary judgment)

December 14, 2001 Hearing
(9:30 a.m.)

March 27th, 2001

J. Frederick Motz
United States District Judge

MDL No. 1069

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: AMERICAN HONDA MOTOR CO., INC.,
DEALERSHIPS RELATIONS LITIGATION

PRETRIAL SCHEDULING ORDER

THIS DOCUMENT RELATES TO ALL CASES

Having heard and considered comment and proposals of the parties at regular s conferences, and pursuant to 28 U.S.C. § 1407 and the Manual for Complex Litigation 3rd,

THE COURT HEREBY ADOPTS THE FOLLOWING SCHEDULING ORDER

March 15, 1997	Close of class certification discovery, except as to: 1) the depositions of the following entities or individuals and related discovery; Bengston, Conway. Finley, M.A.P., Cardiges, Rivers, Benson, Temple, Schuiling and Novelly, and 2) discovery arising out of evidentiary material filed by the parties in connection with the class certification motion, including but not limited to affidavits of lay or expert witnesses.
May 8, 1997	Plaintiffs' motion for class certification served.

June 23, 1997	Defendants' opposition to class certification motion served.
July 9, 1997	Plaintiffs reply papers to opposition to class certification served.
July 3 1, 1997	Plaintiffs shall amend complaints as deemed necessary to comply with rulings on motions to dismiss in the representative cases.
August 15, 1997	Plaintiffs' estimate of damages and methodology to be delivered (not filed) to Defendants, unless accelerated by Court.
September 15, 1997	Defendants, Crossclaim Defendants and Third-Party Defendants shall tile responses to complaints, crossclaims and third-party claims.
April 1, 1998	Close of class action and accelerated cases merits discovery.
May 1, 1998	Class action and accelerated case plaintiffs' expert witness disclosure statements served.
May 6, 1998	Liaison counsel meet and confer regarding scheduling of expert witness discovery in class action and accelerated cases.
May 12, 1998	Expert witness depositions in class action and accelerated cases shall commence

May 31, 1998	Defendants' expert witness disclosure statements in class action and accelerated cases served.
May 31, 1998	Non-accelerated direct action plaintiffs' expert witness disclosure statements served.
June 1, 1998	Liaison Counsel meet and confer re scheduling of remaining expert witness discovery in class action and accelerated cases.
June 5, 1998	Liaison Counsel meet and confer regarding scheduling of expert witness discovery in non-accelerated direct action cases.
June 15, 1998	Expert witness depositions in non-accelerated direct action cases shall commence.
June 26, 1998	Rebuttal expert witness disclosure by all parties in class action and accelerated cases.
June 30, 1998	Liaison Counsel meet and confer regarding remaining expert witness discovery in class action and accelerated cases.
July 13, 1998	Rebuttal expert witness discovery in class action and accelerated cases to commence.

July 15, 1998	Defendants' expert witness disclosure statement in non-accelerated direct action cases served.
July 20, 1998	Liaison: Counsel meet and confer regarding scheduling remaining expert witness discovery in non-accelerated, direct action cases.
July 31, 1998	Close of expert witness discovery in class action and accelerated Cases.
August 15, 1998	Rebuttal expert witness disclosure by all parties in non-accelerated direct action cases.
August 21, 1998	Liaison Counsel meet and confer re scheduling of remaining expert Witness discovery in non-accelerated direct action cases.
August 31, 1992	Motions for summary judgment in class action and accelerated cases served.
September 30, 1998	Opposition to summary judgment motions inch action and accelerated cases served.
October 21, 1998	Reply to oppositions to motions for summary judgment in class action and accelerated cases served

October 30, 1998	Close of merits and expert witness discovery in non-accelerated direct action cases.
November, 1998	Hearing on motions for summary judgment in class action and accelerated cases:
November 20, 1998	Motions for summary judgment in non-accelerated direct action cases served.
December 21, 1998	Opposition to motions for summary judgment in non-accelerated direct action cases served.
January 10, 1999	Reply to opposition for summary judgment motions non-accelerated direct action cases served
January 25, 1999	Trial of first accelerated direct action case or class action.
March, 1999	Hearing on motions for summary judgment in non-accelerated direct action cases.

Dated July 2, 1997

J. FREDERICK MOTZ, Judge
United States District Court
For the District of Maryland

APPROVED AS TO FORM

Dated: _____, 1997

LIAISON COUNSEL FOR CLASS PLAINTIFFS

William A. Kershaw

Dated: _____, 1997

LIAISON COUNSEL FOR DIRECT ACTION PLAINTIFFS

Richard McNamara

Dated: _____, 1997

LIAISON FOR DEFENDANTS ON ATTACHMENT "A"

1/29/01

By /s/, Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBER OF
J. FREDERICK MOTZ
UNITED STATE
DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND
21201
(410) 862-0782
FAX (410) 962-2698

February 13, 1998

Memo to Counsel Re: Scardelletti, et al. v. Bobo, et al.
Civil No. JFM-95-52
Scardelletti, et al. v. Devlin, t al.
Civil No. JFM-97-3464

Dear Counsel:

This will confirm the schedule set during the conference held today

January 30, 1998	Targeted date for plaintiffs to provide to defendants actuarial information relevant to DeBarr subclass; deadline for plaintiffs to oppose Devlin defendants' pending motion to dismiss or transfer
March 2, 1998	Deadline for plaintiffs to file motion on for certification of defendant classes
April 1, 1998	Deadline for defendants to respond to plaintiffs' motion for class certification (subject to plaintiffs having met January 30, 1998 targeted date for submission of actuarial information); deadline for

	Devlin defendants to reply their motion to dismiss or transfer
April 17, 1998	Deadline far plaintiffs to submit reply re class certification
June 5, 1998 9:30 a.m.	Hearing on all pending motion other than motion for reconsideration in Bobo case (the latter motion will be argued after resolution of class certification issues)

This will also confirm that the trial schedule previously set in Bobo is rescinded.

Despite the informal nature of this ruling of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz
United States District Judge

cc: Court File

Despite the informal nature of this ruling of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz
United States District Judge
cc:. Court File

42 U.S.C.A. § 2000e-2

Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any

way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish in-compatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with

similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) APPEALS. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998.)

Federal Rules of Civil Procedure

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(a) MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good

faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circum-stances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or

that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Supreme Court, U.S.
FILED
NOV - 5 2003
OFFICE OF THE CLERK

No. 03-524

IN THE

Supreme Court of the United States

WILBERT SKIPPER, JR., *et al.*,
Petitioners,

v.

GIANT FOOD INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

ROBERT P. WATKINS
KUMIKI GIBSON

WILLIAMS & CONNOLLY LLP
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(202) 434-5457

Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether petitioners have standing to seek review of the rulings denying class certification in light of the fact that all of their claims were dismissed from the case by summary judgments that are final and no longer subject to review.

2. Whether the Court of Appeals correctly held that the District Court acted within its discretion in (a) deciding petitioners' motion for class certification and respondent's motions for summary judgment on the same day; (b) deciding the class certification motion based on affidavits, briefing, and oral argument; and (c) denying class certification after finding that petitioners had not satisfied Fed. R. Civ. P. 23(a)(2), (3), and (4), or any of the requirements of Fed. R. Civ. P. 23(b).

3. Whether this Court has jurisdiction to review a discovery order that was not properly appealed and that was well within the District Court's discretion.

CORPORATE DISCLOSURE STATEMENT

Respondent Giant Food Inc. is wholly owned by Royal Ahold, a publicly-held company.

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IN THE

Supreme Court of the United States

No. 03-524

WILBERT SKIPPER, JR., *et al.*,
Petitioners,

v.

GIANT FOOD INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure and Rule 4 of the Federal Rules of Appellate Procedure are reproduced in respondent's appendix ("Resp. App."), which is attached.

STATEMENT

A. Giant Food Inc. and This Litigation

During the relevant time period, respondent Giant Food Inc. ("Giant") was operating approximately 150 supermarkets across five states and the District of Columbia. It serviced and supported these supermarkets through over half a dozen warehouses, two salvage/recycling centers, and several manufacturing facilities, which were located in different cities and towns throughout the region. Petitioners' Appendix

("Pet. App.") 4a. Each of these operations was conducted through numerous different departments, managed by scores of different supervisors. *Id.* Throughout this period, Giant employed, for its warehousing, recycling, and manufacturing operations alone, thousands of workers — unionized and non-unionized, permanent and temporary — in over 265 positions. *Id.*

Petitioners are nine African-Americans who were employed in a variety of positions in different Giant warehouses and salvage/recycling centers, and one African-American who was employed in a Giant supermarket. They, along with two others, brought suit in 1996 in the United States District Court for the District of Maryland against Giant and several Giant officials,[1] complaining of a variety of alleged instances of discriminatory treatment, in violation of Title VII, 42 U.S.C. § 1981, and other federal and state laws. Pet. App. 2a-4a. Specifically, petitioners alleged racial discrimination in every aspect of employment — in hiring, training, promotion, discipline, and termination — regardless of whether they themselves had been subjected to such purported discrimination. Pet. App. 16a. They asserted individual claims of discrimination and claims of discrimination on behalf of virtually every other African-American worker at Giant. Pet. App. 15a-16a.

After lengthy discovery on both their individual claims and their purported class claims,[2] in early 2001, petitioners moved to stay proceedings indefinitely, which Giant opposed and which the District Court denied. Supplemental Joint Appen-

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[1] Although the petition names these officials as respondents, no ruling concerning any of those individuals is referenced in the petition. Thus, the references herein to "respondent" refer to Giant Food Inc.

[2] Discovery was stayed from late 1997 to mid-1999 pending resolution of an interlocutory appeal of an unrelated issue. *See Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999).

dix ("SJA") 44.[3] During a hearing held on the stay motion, petitioners requested additional time to file their motion for class certification and asked to be allowed to file their certification motion approximately a month after the deadline for summary judgment motions. SJA 44-46. The District Court granted these requests. SJA 46; Pet. App. 212a-213a.[4]

On July 3, 2001, several days after their requested deadline, petitioners filed their motion for class certification. In their motion, petitioners asked the District Court to certify: (1) a sub-class of "all current, former and future African American persons who were permanent union employees" in Giant's warehousing, recycling, and manufacturing operations, as to whom it alleged racial discrimination in hiring, promotion, discipline, training, and termination, and a hostile work environment; and (2) a sub-class of "all African American persons who are former, current and future vacation relief workers" who were rejected for permanent employment at Giant warehouses, as to whom it alleged racial discrimination in hiring and promotion. Pet. App. 3a-4a.[5] In support of their motion, petitioners submitted "2 statistical reports," and "excerpts from 25 depositions, 75 affidavits and 100 other exhibits." Pet. 6.

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[3] The "Supplemental Joint Appendix" refers to the supplemental appendix that was filed in the Court of Appeals.

[4] Petitioners' suggestion that the District Court ordered petitioners to file their motion for class certification after respondent filed its motions for summary judgment, Pet. 7-8, 13, is flat wrong, SJA 44-46.

[5] Both the District Court and the Court of Appeals properly declined to consider a late-filed memorandum in which petitioners sought to redefine the proposed sub-classes from two to four. *See* Pet. App. 42a n.2, 12a n.3. The District Court noted, however, that even if petitioners' proposed revision were considered, "the same analysis would apply and the amended proposed subclasses would also fail." Pet. App. 42a n.2.

B. The District Court's Rulings

After considering all the briefs and the evidence submitted by both parties, and also hearing oral argument, on February 20, 2002, the District Court entered an order denying petitioners' motion for class certification. Pet. App. 52a. In an accompanying opinion, the District Court found that the proposed sub-classes failed to satisfy three of the four requirements mandated by Fed. R. Civ. P. 23(a): commonality, typicality, and adequacy of representation. As to the typicality and commonality requirements, the court found that

> this litigation involves an aggregate of individual disparate treatment claims. Moreover, during the course of their careers, the putative class members worked in at least thirteen different facilities, located in five different towns or cities. . . .

Pet. App. 18a (footnote omitted).[6]

Even if those requirements had been met, the court continued, petitioners had failed to satisfy Rule 23(a)(4)'s requirement that "the representative parties will fairly and adequately protect the interests of the class." Pet. App. 18a-19a.

Finally, the District Court found that petitioners did not satisfy the additional requirements of Rule 23(b)(2) or Rule 23(b)(3).[7] Specifically, the court held that petitioners did not satisfy Rule 23(b)(2) because the relief they sought was primarily monetary, not injunctive. Pet. App. 19a. It

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[6] The District Court also found that "[p]laintiffs ha[d] not identified any neutral practice or policy that lies at the basis of their claims," so as to enable them to pursue a disparate impact theory of liability. Pet. App. 17a. Petitioners point to no abuse of discretion or error regarding this finding. Pet. 16-17.

[7] Petitioners only sought certification under (b)(2) or (b)(3); they never claimed to have satisfied Rule 23(b)(1).

also held that common questions of fact or law did not predominate over questions affecting the individuals, as required by Rule 23(b)(3). *Id.*

The District Court then addressed each petitioner's individual claims of discrimination, and, in a series of individual opinions issued that same day, granted summary judgments for respondent on all of the claims being asserted by petitioners. Pet. App. 23a-32a, 54a-135a.[8] The petition does not seek review of those summary judgment rulings.

In a separate order, also issued on February 20, 2002, the District Court directed respondent to pay petitioners $25,000 for extra costs incurred by their expert as a result of mistaken statistical information provided by Giant during discovery. Pet. App. 195a. As the court subsequently explained, "Giant's mistake was entirely inadvertent." Pet. App. 196a.

Four days later, plaintiff Carson and petitioners Newman and Blocker asked the District Court, through a letter from their counsel, to "alter and amend" its February 20, 2002 order. Joint Appendix ("JA") 13953-55.[9] Specifically, they asked the Court to limit the award to the three of them and to increase the amount of the award in order to recoup certain attorney fees and costs. *Id.* Petitioners based these requests on principles of fairness and equity. JA 13954. Nowhere in this letter do petitioners raise any issue pertaining to attorney-client privilege. *Id.*

On April 2, 2003, the District Court denied petitioners' request to "alter and amend." Pet. App. 196a-198a. In its memorandum and order, the court directed petitioners' attorney to distribute the award to petitioners in the proportion in

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[8] The plaintiff as to whom the District Court declined to grant summary judgment (Gregory Carson) later settled and dismissed his complaint.

[9] The "Joint Appendix" refers to the original appendix filed in the Court of Appeals.

which they had incurred extra costs, and ordered her not to retain any portion of this award for herself. *Id.* Petitioners took no further action on this issue in the district court.

On March 19, 2002, petitioners appealed, to the United States Court of Appeals for the Fourth Circuit, the "[o]rders denying Class Certification and the dismissal of each of their individual claims." Resp. App. 4a. On April 9, 2002, petitioners filed what they styled a "Supplemental Consolidated Notice of Appeal," in which they sought to appeal "[o]rders dated February 20, 2002 and March 2, Orders denying their award for all costs, fees and as well as all other issues concerning the award of Sanctions." Resp. App. 8a.

C. The Court of Appeals' Affirmance

The Fourth Circuit (Wilkins, C.J., and Wilkinson and Luttig, JJ.), in a *per curiam* opinion, affirmed the District Court's denial of class certification. Pet. App. 1a. It held that the District Court had not abused its discretion in this case. Pet. App. 6a.

Specifically, the court found that in light of the number and variety of operations, physical facilities, departments, positions, supervisors, and workers involved, "the facts will vary widely from worker to worker in cases of disparate treatment, and they will vary widely from warehouse to warehouse in cases of a hostile work environment." Pet. App. 5a. It concluded: "Given the individualized nature of plaintiffs' claims in each subclass, the district court did not err in holding plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a)." *Id.* The Court of Appeals also found "no error in the district court's conclusion that adequacy of class representation was lacking in this case." Pet. App. 5a. Further, the Court of Appeals held that, even if petitioners had satisfied the prerequisites of class certification under Rule 23(a), "certification would still be

improper in this case because plaintiffs cannot satisfy *any* of the Rule 23(b) criteria." Pet. App. 6a (emphasis supplied).

In a footnote, the Court of Appeals also rejected petitioners' assertion that the District Court had decided the motions for summary judgment before ruling on the motion for class certification. Pet. App. 13a n.4. It held that the record did not sustain petitioners' premise: "It is not clear from the record that the district court actually ruled on the merits of the summary judgment motion first." *Id.* Moreover, even if it were assumed *arguendo* that the court had done so, the Court of Appeals pointed out, Fed. R. Civ. P. 23(c)(1) requires only that the trial court decide a class certification motion "[a]s soon as practicable," and petitioners had "not demonstrated that the district court ran afoul of that requirement." *Id.*

The Court of Appeals also affirmed the District Court's summary judgment rulings. Pet. App. 7a-12a.

Petitioners sought rehearing and rehearing *en banc*, which was denied. Pet. App. 150a.

REASONS FOR DENYING THE WRIT

Petitioners complain of the District Court's denial of their motion for class certification. Petitioners, however, have no standing to complain about these rulings as they are no longer parties to this litigation. Moreover, even if the certification issue were properly before this Court, there is no reason for review. The District Court's certification ruling involved the routine application of Fed. R. Civ. P. Rule 23. And, the Court of Appeals' affirmance of the District Court's discretionary ruling was plainly correct under well-settled law.

Petitioners implicitly concede that the Court of Appeals' ruling does not conflict with that of any other circuit or of this Court. Instead, they ask this Court to grant their petition in order to "set a necessary standard for the lower courts to follow and to increase their and all litigants' understanding of

the intent and application of Rule 23 in civil rights cases." Pet. 14. But the law already could not be clearer on that point.

In *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), this Court held that a class action is appropriate only when it will promote efficiency and fairness . *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), this Court made clear that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied." And, because class certification is a management tool for district courts, district courts are accorded wide discretion as to whether to certify a case for class treatment. *Califano*, 442 U.S. at 703.[10]

The District Court adhered to this well-settled law, and after applying it, concluded that petitioners had failed to satisfy the requirements of Rule 23. The Court of Appeals agreed. Its holding, like the District Court's, rests on several independent requirements for class certification, each of which petitioners failed to meet. There is no basis for reviewing those rulings yet again.

ARGUMENT

I. PETITIONERS LACK STANDING TO SEEK REVIEW OF THE CLASS CERTIFICATION RULINGS.

Judgments have been entered against all of the petitioners on all of their claims, and all of those judgments have been affirmed on appeal. And, because petitioners do not seek review of those judgments on certiorari, they are now final and not subject to review.

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[10] *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), which petitioners cite without explanation, Pet. 1 n.1, does not concern any issues raised in the petition.

Having had final and non-reviewable judgments entered against them, petitioners no longer possess a case or controversy against Giant or a personal stake in the outcome of this case. They therefore lack standing to complain about the rulings on class certification. *See Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982) ("Unless these [class representatives] can thus demonstrate the requisite case or controversy between themselves personally and [the defendants], none may seek relief on behalf of himself or any other member of the class." (internal quotations omitted)); *Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (*per curiam*) (no case or controversy exists where the representative plaintiffs' substantive claims are mooted before a class is certified); *Warth v. Seldin*, 422 U.S. 490, 502-04 (1975) (petitioners who have no "present interest" in the case lack standing to maintain an appeal of a class action case); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."). Thus, this petition must be denied insofar as it seeks review of the rulings denying class certification.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLASS CERTIFICATION.

Even if they had standing, this petition should be denied as petitioners fail to show any conflicts or errors with respect to the certification rulings.

A. Proper Procedures Were Followed.

1. *Timing of Ruling* — Petitioners complain, without any support, that the District Court decided the summary judgment motions before denying class certification. Pet. 6. But,

as the Court of Appeals pointed out, "[i]t is not clear from the record that the district court actually ruled on the merits of the summary judgment motion first." Pet. App. 13a n.4. Plainly, the District Court's opinion first analyzed and rejected class certification, and only then turned to the first of a series of summary judgment rulings. *Compare* Pet. App. 15a-19a, *with* Pet. App. 19a-53a.[11]

Moreover, even if petitioners' supposition were supported by the record, that would not have been error — much less a reason for certiorari. As the Court of Appeals correctly noted, Rule 23 "requires only that the question of class certification be decided 'as soon as practicable after the commencement of an action brought as a class action.'" Pet. App. 13a n.4 (quoting Fed. R. Civ. P. 23(c)(1)).[12] It was petitioners themselves who for years delayed moving for class certification, waiting to do so until after the close of all discovery, after summary judgment motions had been filed, and after the deadline they requested had passed. After they finally submitted their motion, the District Court heard oral argument and issued its decision approximately a month later. *See* JA 13725; Pet. App. 14a. As the Court of Appeals found, there was no evidence that this decision was not rendered as soon as practicable.

Finally, there is no conflict on this point — within the Fourth Circuit or among the circuits. The majority, if not all, of the circuits addressing this issue have held that trial courts

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[11] This approach makes perfect sense: As this Court has recognized, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (quotation omitted).

[12] Indeed, *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995), *cert. denied*, 516 U.S. 1027 (1995), a case upon which petitioners rely, stands for this very proposition — not for the proposition that summary judgment may never been decided before class certification. *Id.* at 500.

have the discretion to decide when to address summary judgment motions vis-à-vis class certification motions. *See, e.g., Cowen v. Bank United, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1785, at 128 (2d ed. 1986). Indeed, the Fourth Circuit has expressly *rejected* the "argument that a district court may not determine the issue of summary judgment before the issue of class certification." *Player v. Maher Terminals, Inc.*, Nos. 87-3535, 87-3575, 1988 WL 4581, at *1 (4th Cir. Jan. 19, 1988) (*per curiam*).[13] And the cases petitioners cite, Pet. 10-11, hold no differently. *See Chavez v. Illinois State Police*, 251 F.3d 612, 630 (7th Cir. 2001) ("If 'as soon as practicable' occurs after a case is already 'ripe for summary judgment' then it might be proper for a judge to consider a motion for summary judgment prior to considering a motion for class certification."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 n.7 (1st Cir. 2000) (First Circuit makes clear that it was not deciding the "appropriateness of delaying a class certification ruling until after acting upon an

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[13] Petitioners mistakenly rely on *Nance v. Union Carbide Corp.*, 540 F.2d 718 (4th Cir. 1976), *vacated on other grounds*, 431 U.S. 952 (1977), to support their argument, Pet. 9-10, but nowhere in that case does the Fourth Circuit discuss the appropriateness of deciding a summary judgment motion before a class certification motion. It referred to Rule 23(c) simply for the unremarkable proposition that class status could not be conferred after judgment had been entered in the case. 540 F.2d at 723 n.9. Moreover, subsequent to *Nance*, the Fourth Circuit decided *Player*, making its position on this issue crystal clear.

To the extent a conflict exists or may exist within the Fourth Circuit, petitioners had full opportunity to make this argument when they sought rehearing *en banc*, which the Fourth Circuit declined to grant. Pet. App. 150a-51a. This issue certainly is not one for this Court to address on certiorari.

individual plaintiff's summary judgment motion."); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 350-52 (7th Cir. 1975) (the class determination was not made until after trial; the court did not address the respective timing of summary judgment and class certification rulings).

The Court of Appeals correctly found that the District Court did not abuse its discretion by deciding the class certification and summary judgment motions on the same day, and there is no basis for reviewing this ruling.

2. *Evidentiary Hearing* — Petitioners' argument with respect to desiring an evidentiary hearing, Pet. 18-20, has no support. As petitioners implicitly recognize, such hearings are not required by Rule 23 or any other rule of law. *See, e.g., International Woodworkers v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981) ("[i]t is not essential to the resolution of every class certification motion that the trial court conduct a hearing").[14] Petitioners argue that because, in their view, there were "significant issues" raised by their motion for class certification, the District Court "should" have conducted an evidentiary hearing. Pet. 19.[15] But, petitioners' mere disagreement with the manage-

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[14] The cases petitioners cite, Pet. 18-19, hold no differently. In *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978), the Fourth Circuit held only that a district court must conduct a hearing before approving a "voluntary pre-certification settlement of a [putative class] action," *id.* at 1314, not a motion for class certification. And none of the three district court cases petitioners cite holds that Rule 23 requires an evidentiary hearing. *See Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530 (S.D. Ohio 1999); *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992); *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986).

[15] Petitioners claim that their counsel's adequacy was one of the purported "significant issues" that "should have [been] the subject of a suitable hearing." Pet. 19. The record, however, establishes that, during the oral argument on the motion for class certification, the District Court heard extensive argument from petitioners' counsel concerning the

ment procedures employed by the District Court does not amount to an abuse of discretion — as the Court of Appeals correctly recognized.

B. The Conclusions that Petitioners Had Not Satisfied Rule 23(a) Were Properly Affirmed.

For class certification, plaintiffs must show that they satisfy all of the four requirements of Fed. R. Civ. P. 23(a). The District Court held, and the Court of Appeals agreed, that petitioners had failed to meet not just one, but three of the four requirements. Petitioners offer nothing to support review of those rulings.

1. *Commonality and Typicality* — Petitioners inaccurately state that the Court of Appeals required that the factual underpinnings of their claims be "identical" to those of the putative class members. Pet. 14.[16] Neither it, nor the District Court, held any such thing.

Both the District Court and the Court of Appeals conducted a "rigorous analysis" under Rule 23 and looked for "interrelationships" — as required by *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13, 161 (1982) — and concluded that the diversity in treatment, physical locations, positions, decision-makers, supervisors, and other witnesses precluded a finding of commonality and typicality for either of the proposed sub-classes. Pet. App 4a-5a, 18a. The Court of Appeals concluded that "[g]iven the indi-

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adequacy of her representation, which included discussion of the evidence on the issue. *See* JA 13773-85.

[16] Petitioners also assert that "the district court failed to review or consider incidents beyond 3 years [the applicable statute of limitations] and the court of appeals looked only at 6 years. . . ." Pet. 15. But the Court of Appeals considered the time-barred incidents and concluded that they would suffer the "infirmities" as the timely events that were at issue. Pet. App. 13a n.5.

vidualized nature of plaintiffs' claims in each subclass, we hold that the district court did not err in holding plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a)." Pet. App. 5a. Many other courts have reached the same conclusion in cases involving similar types of multi-facility employers.[17]

2. *Adequacy of Representation* — Petitioners' inability to satisfy the adequacy requirement of Rule 23(a)(4) *alone* justified denial of class certification. In this regard, the Court of Appeals concluded:

> We also find no error in the district court's conclusion that adequacy of class representation was lacking in this case. . . . The district court noted that class counsel had made significant errors in this action, both of substance and form. The court further questioned counsel's financial ability to represent a class of this size, noting

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[17] *See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 (11th Cir. 1997) (claims of racially hostile work environment are "factually very diverse"); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (reversing class certification order, noting the district court's "apparent failure to appreciate the significance of the dispersion of [the employer's] work force . . . throughout a great number of geographically separated facilities"); *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 647 (W.D. Mo. 2001) (commonality and typicality absent when hostile work environment claims applied to two different physical facilities); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 550-561 (D.S.C. 2000) (no commonality when allegations spanned various sites, the membership class was diverse, and employer did not utilize a centralized decision-making process); *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424, 432 (E.D. Wis. 2001) (class certification denied when "decisions of apparently hundreds of center managers are implicated, requiring many individualized inquiries"); *Levels v. Akzo Nobel Salt, Inc.*, 178 F.R.D. 171, 177-178 (N.D. Ohio 1998) (certification denied when putative class members were "exposed to different co-employees, different supervisors, and different working conditions").

> that plaintiffs' expert had already threatened to withdraw from the case and to file a lawsuit over the late payment of fees.

Pet. App. 5a-6a.

Petitioners do not challenge the Court of Appeals' ruling on this issue: They do not dispute the facts or argue that the facts do not support the ruling.[18] In light of these implicit concessions, it is clear that the denial of class certification was proper and need not be reviewed on certiorari.

C. The Conclusions that Petitioners Had Not Satisfied Rule 23(b) Were Properly Affirmed.

The Court of Appeals also correctly concluded that the District Court acted well within its discretion in holding that petitioners failed to meet the requirements of either 23(b)(2) or 23(b)(3).

1. *Rule 23(b)(2)* — In yet another misconstruction of the lower courts' rulings, petitioners contend that "both courts denied class certification allegedly on the basis that [petitioners] requested monetary relief in connection with the equitable and declaratory relief demanded." Pet. 17. That is plainly incorrect.

The District Court did not deny certification based on the fact that petitioners sought monetary relief. Rather, it denied certification based on the fact that the relief sought would "relate *exclusively* or *predominantly* to money damages." Pet. App. 19a (emphasis supplied). The Court of Appeals agreed that because of the amount of the monetary demand, this case was "more properly viewed as one for monetary relief." Pet. App. 6a. And, both rulings are correct: Rule

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[18] Petitioners' only statement on this issue is made in the context of their complaint about the lack of an evidentiary hearing: "Adequacy of counsel is a factual issue upon which the court must make a sufficient inquiry." Pet. 19.

23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's note for 1966 Amendment. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) ("in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not").[19]

2. *Rule 23(b)(3)* — With respect to Rule 23(b)(3), petitioners contend only that the lower courts incorrectly looked for "the same factual indignity in this action at the same time and under the same circumstance[s]." Pet. 18. That position is both unsupported and wrong. Specifically, the lower courts found that given the individualized nature of petitioners' substantive claims and their claims for damages, petitioners could not show that common questions of law or fact would predominate over individualized issues. Pet. 6a, 19a. These rulings were completely consistent with Rule 23 and this Court's precedent. *See* Fed. R. Civ. P. 23 advisory committee's note for 1966 Amendment (cases involving "significant questions" regarding damages may not be suitable for certification under 23(b)(3)); *Amchem Prods. v. Windsor*, 521 U.S. 591, 623-24 (1997) (Rule 23(b)(3) is not satisfied where 23(a)'s commonality requirement is not met or where plaintiffs "share little in common, either with each other or with the [putative] class members."). And, petitioners do not show otherwise.

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[19] *See also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (Rule 23(b)(2) is not satisfied where the court will be called upon to "assess[] damages for . . . inherently individual injuries"); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (same); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986) ("subsection (b)(2) was limited to claims where the relief sought was primarily injunctive or declaratory").

III. THE DISCOVERY ORDER WAS NOT PROPERLY APPEALED, AND DOES NOT MERIT REVIEW IN ANY EVENT.

Petitioners also complain about a commonplace discovery ruling, with which they disagree:

> The sanction in this case should have included all costs incurred and the court should not have conditioned petitioners' ability to obtain a monetary award upon their counsel divulging confidential client information to respondents, which would directly affect their case and the Muhammad case.

Pet. 20.[20]

This issue is not properly before this Court. As the record makes clear, the attorney-client issue was never raised with the District Court. JA 13953-55. Thus, petitioners were barred from raising it on appeal, the Court of Appeals properly declined to rule on it, and this Court should reject it. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Even if this issue had been properly raised in the courts below, it is not properly before this Court. The orders about which petitioners complained in their "Supplemental Consolidated Notice of Appeal" were orders dated "February 20, 2002" and "March 2, 2002." This Supplemental Consolidated Notice of Appeal was filed on or about April 9, 2002. Thus, it clearly was untimely as to the February 20, 2002 order and to any March 2, 2002 orders. *See* Fed. R. App. P. 4(a) (30-day time limit for the filing of a notice of appeal). And, for that additional reason, the Fourth Circuit properly ignored it, as should this Court. *See United States v.*

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[20] *Muhammad v. Giant Food Inc.*, Nos. 01-1031 to -1036 (4th Cir.), is an unrelated case that was commenced against Giant by petitioners' counsel.

Robinson, 361 U.S. 220, 229 (1960) ("[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.").[21]

Finally, even if this issue had been properly preserved and properly appealed, there is no basis for review. The District Court determined that by providing the incorrect data, Giant simply made a "mistake," which was "entirely inadvertent." Pet. App. 196a. In light of this, the court concluded that petitioners who had actually incurred the additional costs were entitled only to reimbursement of their proportionate share. *Id.* And, because petitioners' counsel had not "handled this issue in a responsible manner," the District Court refused to order Giant to pay petitioners' attorney fees and costs. Pet. App. 196a.

Petitioners fail to identify any abuse of discretion with respect to these rulings; they merely voice their disagreement with the outcome. Pet. 20.[22] This simply is insufficient for

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[21] To the extent that petitioners were attempting to appeal the April 2, 2002 order denying their request to alter and amend, they have never to this day made any effort to correct the error in their Supplemental Consolidated Notice of Appeal. Thus, any issues pertaining to the April 2, 2002 order were never properly appealed to the Fourth Circuit and are not properly before this Court. *See Becker v. Montgomery*, 532 U.S. 757, 765-66 (2001) (Because Rules 3 and 4 of the Federal Rules of Appellate Procedure are "jurisdictional in nature," the notice of appeal "must contain" all of the information specified in Rule 3(c), including the precise judgment or order being appealed.).

[22] Petitioners' attorney-client privilege argument, which has been waived, is also baseless. Petitioners claim, without any support, that the facts concerning the allocation of expert payments are protected by the attorney-client privilege. Pet. 20. But it is well established that "protection of the privilege extends only to *communications* and not to facts." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (quotation omitted) (emphasis in original); *cf. Vingelli v. United States*, 992 F.2d 449, 454 (2d Cir. 1993) (fee information is not privileged where it is not "confidential communications made for the purpose of obtaining legal advice").

certiorari review of a discovery order. *See Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1999); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT P. WATKINS
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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

[Filed Mar 20, 2002]

Civil Action No. JFM-96-2882

GREGORY CARSON et. al.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-537

WILBERT SKIPPER, JR.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-538

MELVYN CONNOR,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-539

WILLIAM INGRAM

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-540

DAVID NEWMAN,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-541

ANTHONY BLOCKER

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-542

MAURICE MATHEWS

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-543

W. KIRB QUALLS, JR.,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-544

JOHN DALLAS, JR. AND DAVID JONES,

Plaintiffs,

v.

GIANT FOOD INC., et. al.,

Defendants.

CONSOLIDATED NOTICE OF APPEAL

Plaintiffs Wilbert Skipper, Melvyn Connor, William Ingrain, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Quails, John Dallas and David Jones hereby file this Consolidated Notice of Appeal in the above captioned matters. They hereby notice an appeal of the

Honorable J. Frederick Motz's Orders denying Class Certification and the dismissal of each of their individual claims. See Attached Nine (9) Memorandums, Opinions and Orders.[1]

Respectfully Submitted,

/s/ Jo Ann P. Myles
JO ANN P. MYLES
LAW OFFICE OF JO ANN P. MYLES
1300 Mercantile Lane
Suite 139-S
Largo, Maryland 20774
Bar No. 04412
301-474-0261

Dated: March 19, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 19th of March 2002 I had mailed by postage prepaid Plaintiffs Skipper, Connor, Ingram, Newman, Blocker, Mathews, Qualls, Dallas and Jones, Consolidated Motice of Appeal To Defendants Counsel:

ROBERT WATKINS, ESQUIRE
KUMIKI GIBSON, ESQUIRE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street N.W.
Washington, D.C. 20005

/s/ Jo Ann P. Myles
Jo Ann P. Myles

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[1] Pursuant to the Court's February 20, 2002 Order *in Carson et. al. v. Giant Food, Inc. et. al.* JFM-96.2882 Paper Number 313 the above plaintiffs are fling this Consolidated Appeal . According to the Court's Order they are only required to pay one fling fee. See Exhibit 1. Paper Number 313. Please also note that no Appeal is being taken on the part of Plaintiff Gregory Carson. The nine Plaintiffs are taking an Appeal of the Court's Order denying Class Certification in Carson et. al. v. Giant Food, Inc. et. al. which they filed.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

Civil Action No. JFM-96-2882

GREGORY CARSON et. al.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-537

WILBERT SKIPPER, JR.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-538

MELVYN CONNOR,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-539

WILLIAM INGRAM

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-540

DAVID NEWMAN,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-541

ANTHONY BLOCKER

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-542

MAURICE MATHEWS

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-543

W. KIRB QUALLS, JR.,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-544

JOHN DALLAS, JR. AND DAVID JONES,

Plaintiffs,

v.

GIANT FOOD INC., et. al.,

Defendants.

SUPPLEMENTAL CONSOLIDATED NOTICE OF APPEAL

Plaintiffs Wilbert Skipper, Melvyn Connor, William Ingram, David Newman, Anthony Blacker, Maurice Mathews, W. Kirb Quails, John Dallas and David Jones hereby file this Supplemental Consolidated Notice of Appeal in the above captioned matters. They hereby supplement their

Consolidated notice of appeal fled on March 19, 2002 by also noticing an appeal of the Honorable J. Frederick Motz's Orders dated February 20, 2002 and March 2, Orders denying their award for all costs, fees and as well as all other issues concerning the award of Sanctions in the above captioned matter. See Attached the two (2) Memorandums, Opinions and Orders.[1]

Respectfully Submitted,

/s/ Jo Ann P. Myles
JO ANN P. MYLES
LAW OFFICE OF JO ANN P. MYLES
1300 Mercantile Lane
Suite 139-S
Largo, Maryland 20774
Bar No. 04412
301-474-0261

Dated: April 9, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 9th of April 2002 I had mailed by postage prepaid Plaintiffs Skipper, Connor, Ingram, Newman, Blacker, Mathews, Quails, Dallas and Jones' Supplemental Consolidated Notice of Appeal To Defendants Counsel:

ROBERT WATKINS, ESQUIRE
KUMIKI GIBSON, ESQUIRE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street N.W.
Washington, D.C. 20005

/s/ Jo Ann P. Myles
Jo Ann P. Myles

---

[1] Plaintiffs' original appeal in this matter was filed on March 19, 2002. The above plaintiffs now take an appeal of the Court's two subsequent orders concerning their motions for sanctions. Plaintiffs also reserve the right to appeal other issues that were litigated in the above captioned matter.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBER OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-0782
FAX (410) 962-2698

February 20, 2002

Memo To Counsel Re: *Gregory Carson*, et al. v. *Giant Food, Inc.*, et al. Civil No. JFM-96-2882

Dear Counsel:

I have reviewed the papers submitted in connection with plaintiff's motion for sanctions against Giant for Giant's failure to provide complete information during discovery.

I have concluded that Giant should reimburse Plaintiffs in the amount of $25,000. In making this ruling, I am not finding that Giant failed to act in good faith by initially submitting incorrect data. Nevertheless, it seems to me that a cost shifting is appropriate since it is clear that Plaintiffs were put to additional expense by Giant's mistake. The record establishes that an additional $8,000 was spent on Dr. Zellner's first report that would not have been incurred if Giant initially submitted the correct data. Likewise, a second report would have been unnecessary. However, since the production of full and complete data by Giant in the first instance presumably would have increased to some extent the cost of the first report, I am deducting $2,364.00 from the $19,364.00 claimed by plaintiffs for preparing the second report.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz
United States District Judge

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed Apr 3, 2002]

Civil No. JFM-96-2882

GREGORY CARSON

v.

GIANT FOOD, INC., ET AL.

MEMORANDUM

By a letter dated February 24, 2002, plainti ffs have informally requested this court to alter and amend its ruling in the letter order dated February 20, 2002, awarding plaintiffs $25,000 for work done by Dr. Harriet Zellner that would not have had to be performed but for a mistake made by defendant Giant Food in compiling statistical information that was forwarded to Dr. Zellner.

First, plaintiffs ask that the amount of the award be increased by $16,075 because of attorney fees and costs that three of the plaintiffs (Messrs. Carson, Newman, and Blocker) incurred in obtaining the $25,000 award. I previously ruled that plaintiffs should not be compensated for these attorney fees and costs. I adhere to that ruling. As I previously stated, Giant's mistake was entirely inadvertent. Moreover, if plaintiffs had handled this issue in a responsible manner, their attorney fees and costs would have been negligible.

Second, plaintiffs' counsel requests that the $25,000 be awarded not to all plaintiffs but only to three of them, Messrs. Carson, Newman, and Blocker, under the theory that they

were the only plaintiffs to pay the additional costs. The record demonstrates that at least one other plaintiff in this case, Mr. Mungro, has asserted a claim for reimbursement from the $25,000. Moreover, it also appears from the record that some or all of the plaintiffs in the related Muhammad litigation may also have valid reimbursement claims. Finally, based upon the February 24, 2000 letter, it appears that plaintiffs' counsel may also have contemplated being paid $16,075 for attorney fees and costs out of the award although the award expressly was for fees paid to Dr. Zellner in connection with preparing two statistical reports.

Based on the record before me, it seems that plaintiffs' counsel is confused as to the basis of the $25,000 award. $8000 was awarded for additional expenses associated with Dr. Zellner's first statistical report. $17,000 was awarded for additional expenses associated with Dr. Zellner's second statistical report. It is unreasonable to argue that only Messrs. Carson, Newman, and Blocker paid Dr. Zellner for the overpayments that have been awarded. Numerous plaintiffs in Muhammad and Carson contributed to the total costs of the two reports.

I have determined that the most efficient and fair way to administer the $25,000 is to place upon plaintiffs' counsel, Jo Ann P. Myles, Esq., the responsibility to compute each plaintiffs share of the award.[1] Ms. Myles is to determine the proportional contribution of each plaintiff, whether a Muhammad, plaintiff or a Carson, plaintiff, to each report, and then determine, based upon that calculation, the amount of reimbursement each plaintiff is entitled to. For example, if Plaintiff A contributed ten percent of the cost of the first statistical report, he is entitled to ten percent of $8000 ($800).

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[1] None of the $25,000 should be paid to Ms. Myles. Nor should any of the award be paid to Dr. Zellner in connection with her costs related to preparing materials in support of plaintiffs' renewed motion for sanctions.

If Plaintiff B contributed seven percent of the cost of the second statistical report, he is entitled to seven percent of $17,000 ($1,190).

Ms. Myles is directed to submit her computations to the court, sending copies to counsel for Giant and to Mr. Mungro on or before April 26, 2002. If either Giant or Mr. Mungro have any objection to the calculations, they should file their objections on or before May 10, 2002. If no objections are filed, Giant should then issue separate checks to each plaintiff in the amount shown on Ms. Myles' computation sheet.

Date:

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed Apr 3, 2002]

Civil No. JFM-96-2882

GREGORY CARSON

v.

GIANT FOOD, INC., ET AL.

ORDER

For the reasons stated in the accompanying memorandum, it is, this 2nd day of April 2002.

ORDERED

1. The clerk is directed to file the attached February 24, 2002 letter from plaintiffs' counsel to the court as a motion to alter and amend the ruling made by this court on February 20, 2002;

2. The motion is denied; and

3. The $25,000 award should be paid in accordance with the procedure set forth in the accompanying Memorandum.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

2003 REVISED EDITION

As amended to May 23, 2003

Includes Proposed Amendments adopted March 27, 2003, to become effective December 1, 2003, absent contrary Congressional action for Federal Rules of Civil Procedure, Evidence and Appellate Procedure.

Rules of Civil Procedure
Rules of Judicial Panel on Multidistrict Litigation
Rules—Habeas Corpus Cases
Rules—Motion Attacking Sentence Rules of Evidence
Rules of Appellate Procedure
Rules of the Supreme Court

Includes laws through Public Law 108-23, May 19, 2003

Title 28, Judiciary and Judicial Procedure
Act June 25, 1948, c. 646, §§ 2 to 39
Appendix:

Judicial Personnel Financial Disclosure Requirements [Repealed]

Development of Mechanisms for Resolving Minor Disputes [Codified]

Constitution of the United States

Title 5, Government Organization and Employees

App. 4—Financial Disclosure Requirements of Federal Personnel

Consolidated Index

THOMSON
WEST

Mat#40070977

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods

for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those

whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to sib whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be

given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998.)

* * *

ADVISORY COMMITTEE NOTES

1966 Amendment

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. *684, 707* & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veteran' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C.1952); *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F.Supp. 870 (W.D.Pa.1947); *Deckert v. Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa.1939), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert*, 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v. Reed*, *180* F.2d 991 (6th Cir.1950); *Wilson v. City of Paducah*, 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co. v. Montieello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), *cert. denied*, 323 U.S. 776 (1944); *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers' & C. Assn. v. Philad Co.*, 34 F.Supp. 264 (D.De1.1940); 41 F.Supp. 701 (D.Del.1940), aff'd mem., 129 F.2d 1020 (3d Cir.1942). second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers*

Sec. Corp., 17 F.R.D. 245 (E.D.Pa.1954), aff d 230 F.2d *717* (3d *Cir.1956); Gieseeke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945) (see *Chafee*, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 320 (3d Cir.1944), *cert. denied*, 325 U.S. 867 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis, [1901] A.C. 1; Sheffield Waterworks v. Yeoman*, L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's *Federal Practice*, pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), pet. cert. dism., 371 U.S. 801(1963); but cf. P. *W. Husserl, Inc, v. Newman*, 25 F.R.D. 264 (S.D.N.Y.1960); *Athas v. Day*, 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen v. Black*, 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but *cf. Wagner v. Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keeffe, Levy & Donovan, supra; *Developments in the law*, supra, 71 Harv. L.Rev. at 937-38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Baryon & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351-52 (Wright ed.1961). These, are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir.1950); *Zachman v. Erwin*, 186 F.Supp. 681(S.D.Tex.1959); *Baim & Blank, Inc, v. Warren-Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a

possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v. Loony*, 219 F.2d 529 (9th Cir.1955); *Rank v. Krug*, 142 F.Supp. 1, 154-59 (S.D.Calif.1956), on *app., State of California v. Rank*, 293 F.2d 340, 348 (9th Cir.1961); *Gart v. Cole*, 263 F.2d 244 (2d Cir.1959), *cert. denied* 359 U.S. 978 (1959); cf. *Martinet v. Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir.1955); 3 Moore, supra, par. 23.11 [2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Waybright v. Colombian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn.1939); cf. *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (as actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), aff d, 230 F.2d 717 (3d Cir. 1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp..957 (D.Del.

1949); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed v. Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel v. Whinier Corp.*, 95 F.Supp. 643 (E.D. Mich.1951), app. disco., 195 F.2d 361 (6th Cir. 1952); *Goldberg v. Whinier Corp.*, 111 F.Supp. 382 (E.D.Mich. 1953); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Edgerton v. Armour & Co.*, 94 F.Supp. 549 (S.D.Calif.1950); *Ames v. Mengel Co.*, 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v. Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an' adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to

his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v. Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco v. Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). *Similar problems,* however, can arise in the absence of a fund either present or potential. A negative *or* mandatory *injunction* secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of

specific enumeration. See *Potts v. Flax*, 313 F.2d 284, (5th *Cir.1963); Bailey v. Patterson*, 323 F.2d 201 (5th Cir.1963), *cent. denied*, 376 U.S. 910, (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C.*, 311 F.2d 107 .(4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green v. School B L of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th , Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir.1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C.1955, 3-judge court), affd 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential.. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly

situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. *Chafee*, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir.1952); *Sturgeon v. Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States*, 111 F.Supp. 80 (D.N.J.1953); cf. *Weinstein*, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), pet, cert. disco., 371 U.S. 801(1963); *cf. Weeks v.*

Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busck Inc.*, *194* F.2d 737 (7th Cir.1952); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Drano Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29

U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A deter-

mination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice[,] setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort.

(For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to. their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley*, 800 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801(1963); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here

relevant, 326 U.S. 99 (1945); *Pentland v. Drano Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers* V. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver v. Cudahy Packing* Co., 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law*, supra; 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v. Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram v. San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of

liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir.1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir.1952), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elders*, 209 F.2d 247, 249 (2d Cir.1954); *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass.1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

* * * *

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but

before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex party unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is

entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal, Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of

Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order-is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any, of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)-becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a nota rized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil, case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) when a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

NOV 20 2003

No. 03-524

In the

Supreme Court of the United States

WILBERT SKIPPER, JR.; MELVYN CONNOR; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR. and DAVID JONES;

Petitioners,

v.

GIANT FOOD INCORPORATED; PETER MANOS, in his official capacity; SAMUEL THURSTON, in his official capacity; MARIA MYERS, in her official capacity; ROBERT HAYWOOD, in his official capacity; DEBORAH LILLY, in her official capacity; TOM MAYNARD, in his official capacity and CHRIS BALLADEMAS, in his official capacity,

Respondents.

On Petition for a Writ of Certiorari to the The Court of Appeals for the Fourth Circuit

REPLY BRIEF

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STATEMENT

Petitioners urge the United States Supreme Court to hear their case because the case presents issues of law: (1) that show a serious conflict with this court and among the other federal circuits; (2) it raises serious public policy concerns and (3) it raises constitutional issues as to how the Federal Courts apply Rule 23 in the certification of civil rights class actions.

As a preliminary matter, the respondents opposition does not oppose petitioners' questions presented to the United States Supreme Court. Moreover respondents failed to show candor and honesty with this Court about the procedural posture of the record below. First and foremost, petitioners ' March 19, 2002 notice of appeal and April 8, 2002 supplemental notice of appeal were filed "prematurely". Neither of the two appeals had any force or effect until May 25, 2003, one day after all defendants had been dismissed from *Carson et. al. v. Giant Food Inc. et. al.* JFM 92-2882. Fed. R. Civ. P. 54(b).[1] This crucial fact was omitted in respondents' opposition.

The posture of petitioners' March 19, 2002 notice of appeal" and April 8, 2002 supplemental notice of appeal are in dispute. On March 25, 2002 , the district court characterized petitioners' March 19, 2002 appeal of its February 20, 2002 order as an "interlocutory appeal". (Ret. Br. App. 11a, Docket Entries 318-319)

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[1] Petitioners' April 8, 2003 supplemental notice of appeal was filed with the April 2, 2002 order attached. (Pet. App. 196a-198a) and (SJA. 10a-12a)

The district court's February 20, 2002 order was confusing. (Pet. App. 14a). In the order, the court dismisses 10 of the 11 plaintiffs leaving only plaintiff Gregory Carson's "hostile work environment" claim. (Pet. App. 15a and 37a-51a) Realizing the appeals were premature, on April 8, 2003 petitioners filed two motions to stay, one in the district court and one in the court of appeals. Petitioners filed a motion to stay in district court to prevent the record from going forward to the Fourth Circuit until after Carson's claims had been adjudicated. (Ret. Br. App. 1a-8a) The motion was granted. (Ret. Br. App. 16a Docket Entry 334) On May 24, 2002, Carson settled and all remaining defendants were dismissed. The parties informed this fact to the Fourth Circuit who then denied petitioners' motion to stay on May 29, 2002. (Ret. App. 21a) Petitioners "premature' notice of appeal and supplemental notice of appeal were cured. The appeals took affect one day after 5/24/02 when Carson's case was settled and dismissed in the district court. (Ret. Br. App. 19a, Docket Entry 348)

I. PETITIONERS HAVE STANDING

Respondents' contentions that petitioners have no standing to bring this writ of certiorari are totally without merit. Respondents contend that petitioners have not petitioned this court to review the dismissal of their individual claims. Clearly based on the questions presented to this court, petitioners have sought review of the dismissal of their individual claims. Furthermore, the cases cited by respondents to support their position are actually distinguishable from this matter because petitioners in their complaint alleged detailed allegations of the wrongs they suffered. They alleged

how those wrongs and injuries were similar if not the same as the putative class. Both petitioners and the putative class made claims of being subjected to hanging nooses, segregated locker rooms, the posting of pictures of apes and monkeys with African American employees names posted, having managers and co-workers daily call them 'nigger" and being subjected daily to numerous racial graffiti. The district court agreed. Judge Motz opined in his order that:

> "The record before me clearly demonstrates that racial hostility existed between African-Americans workers and white workers at the Giant warehouses from 1980 to the time this suit was initiated in 1996. On at least four occasions, nooses were displayed in the warehouses. n13 Likewise, racist graffiti written on the walls of the trailers used to transport products from the warehouses to Giant's retail stores was a constant problem Finally, there is evidence that managers and supervisors used racist epithets and made other racially offensive remarks." (Pet. App. 23a).

The district court confirmed the allegations in petitioners' complaint as to a racially hostile environment but refused to certify a class in the warehouses.

II. EMPLOYER'S SUMMARY JUDGMENT MOTIONS SHOULD NOT BE RULED UPON PRIOR TO RULING ON CLASS CERTIFICATION.

Petitioners repeated attempts to have the district court rule on their motion for class certification first and to give them an evidentiary hearing was futile. That court insisted on ruling on Giant Food Inc.'s ("Giant") motions for summary judgment first before considering petitioners' motion for class certification. This identical issue is still pending in the *Muhammad* class action.[2] What is necessary are uniformed standards by which all courts must apply Rule 23 to civil rights class actions.

Lastly, at the March 2001 motions' hearing Judge Motz adopted Giant's proposed scheduling order. Contrary to respondents' allegations in its opposition, it was plaintiff Jerry Mungro's counsel, who is not involved in this petition who requested changing Giant's proposed filing dates. Judge Motz changed the schedule to accommodate Mungro's counsel. Petitioners' counsel objected to the change in the schedule if it meant that the district court was going to rule on Giant's motions for summary judgment prior to ruling on Plaintiffs motion for class certification. Judge Motz ruled on Giant's motions' for summary judgment prior to ruling on petitioners' motion for class certification based on his references in his opinion denying class certification to facts, issues and or events that related to Giant's motions for summary judgment.

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[2] The *Muhammad et. al. v. Giant Food. Inc. al.* Nos. 01-1031-10336 cases were appealed in November 2000. The cases are still pending.

(Pet. App. 14a-51a) What is crystal clear is that Judge Motz entered scheduling orders in direct violation of Rule 23. As the Supreme Court ruled in *Eisen v. Calisle & Jacqueline*, 417 U.S.156,177, 9 FEP 1302 (1974:

> We find nothing in either the language or history of Rule 23 that Gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravene the Rule by Allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it....In short, we agree with Judge Wisdom's conclusion in *Miller v. Mackey International*, 452 F.2d 424 (CA5 1971), where the court rejected a Preliminary Inquiry into the merits of a proposed class action :"in determining the propriety of a class action, the question is not whether the Plaintiff have stated a cause of action or prevail on the merits, but rather the requirements of Rule 23 are met. *Id* at 427.

This Supreme Court ruling generally is still the state of the law.[3] All class action litigants are entitled to a fair

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[3] *Accord Shores v. Sklar* , 844 F.2d 1485 (11th Cir. 1988) (assessment of the plaintiff's likelihood of success on the merits was an improper basis for denial of class certification); *Ross v. Bank South, N.A.*, 837 F.2d 980 (11th Cir. 1988); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), cert. Denied, 485

process and management schedule. Holding civil rights class actions to a higher, stricter and heightened standard than non-discrimination cases is in clear violation of the United States Constitution and the Civil Rights Act of 1964, Amended.

III. AN EVIDENTIARY HEARING SHOULD BE HELD BEFORE DENIAL OF CLASS CERTIFICATION

Contrary to respondents' opposition there is a serious conflict among the circuits as to whether or not an "evidentiary hearing" should be held prior to a denial of class certification. The Supreme Court has held that a "Court should perform a vigorous analysis of the Prerequisites of Rule 23(a) to see if they are satisfied. *General Telephone Co. v. Falcon*, 457 U.S. 147, 28 FEP 1745 (1982)." This has consistently remained the state of the law. In he Fourth Circuit's case of *Lilly v. Harris -Teeter Supermarket*, 720 F.2d 326, 33 FEP 195 (4th Cir. 1983), the Fourth Circuit affirmed certification of a class of those alleging discrimination in discharges and promotions. Specifically, the Fourth Circuit in *Lilly v. Harris-Teeter* held that:

> "...plaintiffs need not, at the time of the motion for class certification. demonstrate by statistical evidence that blacks have been terminated At a higher rate than have whites, or any other differential. Certification is only concerned with the

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U.S. 959 (1988); *Anderson v. City of Albuquerque*, 690 F.2d 796, 29 FEP 1689 (10th Cir. 1982).

> commonality (not the apparent merit) of the claims and the existence of sufficiently numerous groups of persons who may assert those claims." 720 F.2d at 332-33.

However, the Fourth Circuit panel in this matter ignored both the holdings in *General Telephone Co. v. Falcon* and *Lilly v. Harris Teeter*. This case was not one free from doubt. Every aspect, fact or proposed fact was disputed and in controversy. Petitioners' request for an "evidentiary hearing" was consistently denied. There have been a number of courts in other circuits that have held that an "evidentiary hearing" should be held prior to any denial of class certification. *Guerine v. J & W Investment, Inc.*, 544 F.2d 863 (5th Cir. 1977) and *Shepard v. Beaird-Pouan, Inc.* 617 F.2d 87, 22 FEP 1735 (5th Cir. 1980) and *Woodworkers v. Georgia-Pacific Corp.*, 568 F.2d 64, 16 FEP 258 (8th Cir. 1983).

IV. PETITIONERS' APPEALS WERE PREMATURE

Contrary to respondents' opposition. the petitioners' March 19, 2002 notice of appeal and April 8, 2002 supplemental notice of appeal of the district court orders dated February 20, 2002 and April 2, 2002 were "premature". The appeals did not have any force and effect until May 25, 2002, one day after lead Plaintiff Gregory Carson settled and dismissed his case. (Rep. Br. App. 20a, Docket Entry 348)

Because petitioners filed a consolidated case with originally 11, plaintiffs, the petitioners were not entitled to take an appeal until the last defendants were

dismissed. However, Judge Motz's February 20, 2002 order was confusing in that in his opinion he separated all 11 of the plaintiffs and opened up new cases for each one. (Pet. App. 52a-53a) Petitioners filed unknowingly two premature appeal notices. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633-34, 89 L.Ed. 911 (1945) (citation omitted). Carson's one claim was still outstanding on February 20, 2002. The orders appealed were not appealable until after the final adjudication of Carson's "hostile environment" claim. Fed. R. Civ. 54(b).

Any defect in the first or second notices of appeal did not mislead or prejudice the respondents. In reviewing the two notices together it is clear that petitioners sought review of the dismissal of their claims and the denial of full sanctions. Both parties briefed the sanctions order issue and argued the merits of the sanctions issue at oral argument on May 9, 2003. It is too late and "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities". The April 2, 2002 order was timely appealed and should have been addressed by the Fourth Circuit. The Supreme Court has held that:

> "The Federal Rules reject the approach that pleading is a game of Skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80. The Rules themselves provide that they are to be construed 'to

secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Forman v. Davis*, 83 S.Ct 227(1962)

Therefore the Fourth Circuit had jurisdiction to review and decide all issues raised concerning the district court's April 2, 2002 order.

CONCLUSION

Wherefore petitioners pray that this Court grant their Petition for a Writ of Certiorari or in the alternative vacate the Fourth Circuit's June 11, 2003 decision and remand the case back with specific appropriate instructions.

Respectfully submitted,

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(Any footnotes trail end of each document)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MARYLAND

Civil Action No. JFM-96-2882

GREGORY CARSON, et al.,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-537

WILBERT SKIPPER, JR.,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-538

MELVYN CONNOR,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-539

WILLIAM INGRAM,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-540

DAVID NEWMAN,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-541

ANTHONY BLOCKER,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-542

MAURICE MATHEWS,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-543

W. KIRB QUALLS, JR.,
Plaintiff,

v.

GIANT FOOD INC., et al.,
Defendants.

Civil Action No. JFM-02-544

JOHN DALLAS, JR. and DAVID JONES,
Plaintiffs,

v.

GIANT FOOD INC., et al.,
Defendants.

MOTION TO ALTER, AMEND AND TO STAY THE DISTRICT COURT'S ORDER DATED MARCH 25, 2002 CONCERNING PLAINTIFFS' CONSOLIDATED NOTICE OF APPEAL

Plaintiff's Gregory Carson, Wilbert Skipper, Melvyn Connor, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls, John Dallas and David Jones ("Plaintiffs") hereby move this Court To Stay the district court's Order pertaining to the Consolidated Notice of Appeal in the above captioned matters pursuant to fed. R. Civ. Proc. 59.

In support of this motion, Plaintiffs state the following:

1. That the Court on February 20, 2002 in the matter of Carson et. Al. v. Giant Food Inc. et. al JFM96-2882 "Carson Matter") dismissed the above Plaintiffs' claims by way of the defendants' notions for summary judgments.

2. After dismissing the Plaintiffs' claims, this Court also bifurcated the above named plaintiffs from the Carson matter and opened eight (8) new cases with

separate final orders in each of the above Plaintiffs' respective cases.

3. This Court also issued an Opinion and Order in Carson, which allowed Plaintiffs to file a consolidated notice of appeal if more than one plaintiff fled an appeal to the Fourth Circuit Court of Appeals.

4. The above nine plaintiffs therefore filed a consolidated notice of appeal on March 19, 2002 to the Fourth Circuit Court of Appeals.

5. However, on March 25, 2002, this Court entered and Order characterizing Plaintiffs' "Consolidated Notice of Appeal" as an "interlocutory appeal" because them is still pending litigation in the Carson matter. See Exh. 1, Specifically, Plaintiff Gregory Carson is scheduled to got to trial on May 20, 2002 to litigate and try before a jury his one (1) remaining claim, namely that he was subjected to a "racially hostile work environment".

6. Also pending before the fourth Circuit Court of Appeals is the sister class action to the Carson Matter, namely Muhammad et. al. v. Giant Food Inc. et, al JFM98-3565.

7. The Carson Plaintiffs and Muhammad Plaintiffs are raising some of the same and identical claims and issues on appeal. Oral argument was heard in Muhammad on January 22, 2002. No decision has been rendered in Muhammad.

8. Inasmuch that this Court has characterized the Consolidated Notice of Appeal: (1) as being

interlocutory; (2) Plaintiff Carson still has one remaining claim to resolve before a jury on May 20, 2002 and (3) Plaintiffs will be fling a motion to stay and place in abeyance this Consolidated Notice of Appeal fn1 because the Fourth Circuit Court of Appeals is still deliberating in Muhammad et. Al. v. Giant Food Inc JFM98-3565, which has some of the same and identical issues in the above Plaintiffs' Appeal, plaintiffs respectfully move the district court to alter, amend and stay its March 25, 2002 order.

A stay of the Court's March 25, 2002 order would preserve judicial economy and efficiency and prevent the parties from engaging in any needless appellate procedures until the Muhammad Matter on appeal is resolved and the one claim of Plaintiff Gregory Carson is resolved. The defendants would not be harmed by a stay in this matter because the court has characterized the consolidated notice of appeal as interlocutory, which means that even though this court entered separate and distinct final orders for each plaintiff, none had to take an appeal at this time but could have waited until lead Plaintiff Gregory Carson's "Hostile Work Environment" claim had been tried by a jury on May 20, 2002. By staying the appeal it would also eliminate a lot of confusion, unnecessary expense and time for the parties and both courts. Also, the parties could marshal both their time and efforts more effectively in preparing for trial on Plaintiff Gregory Carson's "Hostile Work Environment" claim scheduled for May 20, 2002, which is only approximately five (5) weeks away. Plaintiffs will be fling a formal motion to stay and place in abeyance their Consolidated Notice of Appeal in the Fourth Circuit on April 10, 2002.

Moreover, after receiving this Court's March 25, 2002 order Plaintiffs wrote to the defendants to seek their consent and or concurrence on fling a motion to stay Plaintiffs' appeal. See Exh. 2. At this time the defendants have not responded to Plaintiffs' letter dated March 29, 2002 seeking their consent to this motion. Thus Plaintiffs can only represent to this Court that it is assumed that defendants do not agree to a stay of this matter in the Fourth Circuit or of the district court's March 25, 2002 Order.

Wherefore having shown (1) just and good cause; (2) that the staying of the courts order until: (a) the Fourth Circuit Court of Appeals rule on the Plaintiffs' Motion To Stay and Place in Abeyance their Consolidated Appeal and (b) until Plaintiff Gregory Carson's trial on his "hostile work environment" claim is tried and concluded and (3) that a stay at this time would not harm nor prejudice either party, this Court should grant the Plaintiffs' motion Alter, amend and stay its order dated March 25, 2002. See Exh. l.

Respectfully Submitted,

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301 -474-0261

Dated: April 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 8th of April 2002 I had mailed by postage prepaid Plaintiffs Skipper, Connor, Ingram, Newman, Blocker, Mathews, Qualls, Dallas and Jones, Consolidated Motion To Alter, Amend and Stay The Court's Order Dated March 25, 2002 To Defendants Counsel:

Robert Watkins, Esquire
Kumiki Gibson, Esquire
Williams & Connolly LLP
725 Twelfth Street N.W.
Washington, D.C. 2005

Jo Ann P. Myles

Footnotes

fn1 Plaintiffs Wilbert Skipper, Melvyn Connor, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls, John Dallas and David Jones will be filing a Motion To Stay and Place in Abeyance their Appeal in the Fourth Circuit Court of Appeals on Wednesday, April 10, 2002.

2/20/02	312	ORDER granting [300-1] motion of plaintiffs for Sanctions. Giant is directed to pay $25,000 to Plaintiffs. (signed by Judge J. F. Motz 2/20/02) (c/i 2/20/02) (sf) [1:96cv2882]
2/20/02	313	ORDER denying [246-1] motion of plaintiffs for Class Certification, denying [246-2] motion of plaintiffs for Preliminary Injunction Relief, denying [246-3] motion of plaintiffs for Bifurcation of liability and damages trials granting in part, denying in part [235-1] motion of defendants for Summary Judgment as to Gregory Carson granting [243-1] motion of defendants for Summary Judgment as to Pete Manos, Sam Thurston, Maria Myers, Robert Haywood, Deborah Lilly, Chirs Balodemas, and Tom Maynard, granting [242-1] motion of defendant for Summary Judgment as to Wilbert Skipper, Jr, granting [241-1] motion of defendant for summary Judgment as to Willie Kirb Qualls, granting [240-1] motion of defendant for Summary Judgment as to Jerry Mungro, granting [239-1] motion of defendant for Summary Judgment as to Maurice Mathews, granting [238-1] motion of defendant for Summary Judgment as to William Ingram, granting [237-1] motion of defendant for Summary Judgment as to John

Dallas, Jr. and David Jones, granting [236-1] motion of defendant far Summary Judgment as to Melvyn Connor, granting [234-1] motion of defendant for Summary Judgment as to David A. Newman, granting [233-1] motion of defendant far Summary Judgment as to Anthony Blocker. The Clerk is directed to open nine new case in eight of which each of the plaintiffs in this action, other than Gregory Carson, John Dallas, Jr., and David Jones, is named as the plaintiff, and in the ninth of which John Dallas, Jr. and David Jones are named as the plaintiffs; provided, however, that in the event of an appeal by more than one plaintiff, the cases shall be consolidated and only one filing fee need be paid. (signed by Judge J. F. Motz 2/20/02) (c/i 2/20/02) (sf) [1:96cv2882]

2/26/02 314 Letter MOTION by Gregory Carson, David Newman and Anthony Blocker to Amend [312-1] order (c/s) (sf) [1:96cv2882]

2/27/02 315 RESPONSE by Giant Food, Inc. in opposition to [314-1] motion to Amend [312-1] order by Gregory Carson and exhibits A-G. (c/s) (sf) [1:96cv2882]

3/1/02 316 ORDER, Confirming the schedule set during the confrence held on 3/1/02.

(signed by Judge J. F. Motz 3/1/02) (c/i 3/1/02) (sf) [1:96cv2882]

3/8/02	317	REPLY by Gregory Carson to response to [314-1] motion to Amend [312-1] order by Gregory Carson (c/s) (sf) [Entry date 03/11/02] [1:96cv2882]
3/19/02	318	Interlocutory NOTICE OF APPEAL by David Jones, John W. Dallas Jr., W. Kirb Qualls Jr., Maurice Mathews, Anthony Blocker, David Newman, William Ingram, Melvyn Connors, Wilbert Skipper Jr, with attachments 1 thru 9. Fee Status: (Filing Fee Paid) (c/m: A. Robinson, B. Amini, S. Botts, X. Aragona, J. Myles, O. Amorow, R. Clark, W. R. Watkins, J. Hilden, K. Gibson, K. Jennings, K. Adler, J. Smith, M. London, M. Stefan, C. Butsavage) (c/s) (ko) [Entry date 03/20/02] [Edit date 03/20/02] [1:96cv2882]
3/20/02	--	Consolidated Lead Case (sf) [1:96cv2882]
3/21/02	--	Interlocutory Notice of appeal, and certified copy of docket to USCA: [318-1] appeal by Wilbert Skipper Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls Jr., John W. Dallas Jr., David (c/m) (ko) [1:96cv2882]

3/25/02	319	ORDER DIRECTING the interlocutory notice of appeal by Plaintiffs and any transcripts which may be ordered for the purposes of appeal are excepted from this Order and will be transmitted to the USCA together with a copy of this Order, docket entries and copies of such pleadings as the parties may designate, such copies to be furnished by the parties with 2 weeks from the date of this Order. (signed by Judge J. F. Motz 3/25/02) (c/m & USCA 3/25/02 ko) (ko) [Entry date 03/26/02] [1:96cv2882]
3/28/02	--	USCA Case Number Re: [318-1] appeal by Wilbert Skipper Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls Jr., John W. Dallas Jr., David Jones USCA NUMBER: 02-1319 (Case Manager: Carina Ida) (ko) [1:96cv2882]
3/28/02	320	MOTION with memorandum in support by Giant Food, Inc. in 1:96-cv-02882 to interview Ex Parte African-American Employeesand exhibit A. (c/s) (sf) [1:96cv2882]
4/1/02	321	Letter MOTION for Carey R. Butsavage to withdraw as Attorney, for Marc A. Stefan to Withdraw as Attorney (sf) [1:96cv2882]

4/1/02	422	ORDER granting [321-1] motion for Carey R. Butsavage to Withdraw as Attorney (Terminated attorney Carey R. Butsavage for UFCW Local 400 , attorney Marc A. 5tefan for UFCW Local 400 , granting [321-2] motion for Marc A. Stefan to Withdraw as Attorney (Terminated Marc A. Stefan) (signed by Judge J. F. Motz 4/1/02) (c/i 4/1/02) (sf) [1:96cv2882]
4/3/02	322	MEMORANDUM OPINION (signed by Judge J. F. Motz 4/2/02) (c/i 4/3/02) (sf) [1:96cv2882]
4/3/02	323	ORDERED, that the clerk is directed to file the attached 2/24/02 letter from plaintiffs counsel to the court as a motion to alter and amend the ruling made by this court on 2/20/02. The motion is denied; and the $25,000 award should be paid in accordance with the procedure set forth in. the accompanying Memorandum. (signed by Judge J. F. Motz 4/2/02) (c/i 4/3/02) (c/m) (sf) [1:96cv2882]
4/3/02	324	Letter MOTION by Gregory Carson in 1:96-cv-02882 to Amend or alter [312-1] order (sf) [1:96cv2882]
4/8/02	325	MOTION by Gregory Carson, Skipper, Connor, Ingram, Newman, Blocker, Mathews, Qualls, Dallas and Jones to Alter, Amend and to Stay [319-1] order

concerning plaintiffs consolidated Notice of Appeal (c/s) (sf) [Entry date 04/09/02] [1:96cv2882]

4/9/02	326	SUPPLEMENTAL CONSOLIDATED NOTICE OF APPEAL by David Jones in 1:96-cv-02882, John W. Dallas Jr. in 1:96-cv-02882, W. Kirb Qualls Jr. in 1:96-cv-02882, Maurice Mathews in 1:96-cv-02882, Anthony Blocker in 1:96-cv-02882, David Newman in 1-96-cv-02882, William Ingram in 1:96-cv-02882, Melvyn Connors in 1:96-cv-02882, Wilbert Skipper Jr. in 1:96-cv-02882. Fee Status: (Fee Not Required) (c/m: X. Aragona,, W. Jacobs, O. Amorow, J. Hilden, K. Gibson, R. Watkins, K. Jennings, K. Adler, J. Smith, M. London, R. Clark, S. Botts, A. Robinson, J. Myles, and B. Amini) (c/s) (ko) [Entry date 04/10/02] [Edit date 06/07/02] [1 : 96cv2882]
4/10/02	--	Supplemental Consolidated Notice of appeal and certified copy of docket to USCA: [326-1] appeal by Wilbert Skipper Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls Jr., John W. Dallas Jr., David (c/m) (ko) [1:96cv2882]
4/11/02	327	RESPONSE by Gregory Carson in 1:96-cv-02882 in opposition to [320-1]

motion to interview Ex Parte African-American Employees by Giant Food, Inc. (c/s) (sf) [Entry date 04/15/02] [1:96cv2882]

4/17/02 328 REPLY by Giant Food, Inc. in 1:96-cv-02882 to response to [320-1] motion to interview Ex Parte African-American Employees by Giant Food, Inc. (c/s) (sf) [1:96cv2882]

4/17/02 329 MOTION with memorandum in support by Giant Food, Inc. in 1:96-cv-02882 in Limine to exclude evidence related to previously decided issues, including specifically certain evidence identified in plaintiff's proposed pretrial order and exhibit A-D. (c/s) (sf) [1:96cv2882]

4/17/02 330 MOTION with memorandum in support by Giant Food, Inc. in 1:96-cv-02880 in Limine to exclude evidence related to plaintiff's request for punitive damages (c/s) (sf) [1:96cv2882]

4/17/02 331 RESPONSE by Giant Food, Inc. in 1:96-cv-02882 in opposition to [325-1] motion to Alter, Amend and to Stay [319-1] order concerning plaintiffs consolidated Notice of Appeal by Gregory Carson (c/s) (sf) [1:96cv2882]

4/17/02	332	Proposed pre-trial order submitted by Giant Food, Inc. Gregory Carson (c/s) (sf) [Entry date 04/19/02] [1:96cv2882]
4/19/02	333	ORDER CONFIRMING schedule set during the conference today(signed by Judge J. F. Motz 4/19/02) (c/i 4/19/02) (sf) [1:96cv2882]
4/18/02	334	ORDER granting [320-1] motion of defendant to interview Ex Parte African-American Employees granting [325-1] motion of plaintiff to Amend and to Stay [319-1] order concerning plaintiffs consolidated Notice of Appeal. (signed by Judge J. F. Motz 4/19/02. (c/i 4/19/02) (sf) [1:96cv2882]
4/23/02	335	TRANSCRIPT filed [326-1] appeal by Wilbert Skipper Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls Jr., John W. Dallas Jr., David Jones, [318-1] appeal by Wilbert Skipper Jr., Melvyn Connors, William Ingram, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Qualls Jr., John W. Dallas Jr., David Jones for dates of 1/15/02 (Court Reporter: Mary Zajac) (FILED SEPARATELY) (ko) [1:96cv2882]
4/24/02	336	AMENDED ORDER REAFFIRMING paragraph 1 of the order entered on 4/19/02 granting [320-

1] motion of Giant Food to interview Ex Parte African-American Employees, granting [325-1] motion to Alter, Amend and to Stay [319-1] order concerning plaintiffs consolidated Notice of Appeal signed by Judge J. F. Motz) (c/i 4/25/02) (jl) [Entry date 04/25/021 [1:96cv2882]

4/24/02 337 SUPPLEMENTAL MEMORANDUM by Giant Food, Inc. in support of their [329-1] motion in Limine to exclude evidence related to previously decided issues, including specifically certain evidence identified in plaintiff's proposed pretrial order and Attachments A-G (c/s) (jl) [Entry date 04/25/02] [1:96cv2882]

4/29/02 338 MOTION with memorandum in support by Gregory Carson for Leave to File supplement to the Amended Complaint and proposed Supplement. (c/s) (sf) [Entry date 04/30/021 [Edit date 05/03/02] [1:96cv2882]

5/1/02 339 MOTION by Gregory Carson in Limine to Exclude Evidence Including Specifically Certain Evidence Identified in the Proposed Pretrial Order (c/s) (sf) [Entry date 05/02/02] [Edit date 05/03/02] [1:96cv2882]

5/1/02 340 RESPONSE by Gregory Carson in 1:96-cv-02882 in opposition to [330-1] motion in Limine to exclude evidence related to plaintiff's request for punitive damages by Giant Food, Inc. (c/s) (sf) [Entry date 05/02/02] [Edit date 05/03/02] [1:96cv2882]

5/1/02 341 RESPONSE by Gregory Carson in 1:96-cv-02882 in opposition to [329-1] motion in Limine to exclude evidence related to previously decided issues, including specifically certain evidence identified in plaintiff's proposed pretrial order by Giant Food, Inc. (c/s) (sf) [Entry date 05/02/02] [Edit date 05/03/02] [1:96cv2882]

5/3/02 342 RESPONSE by Giant Food, Inc. in 1:96-cv-02882 in opposition. to [338-1] motion for Leave to File supplement to the Amended Complaint by Gregory Carson (c/s) (sf) [1:96cv2882]

5/10/02 343 STATUS REPORT by Giant Food, Inc. on compliance with the Court's 4/2/02 order regarding the payment of certain expert fees and costs and Attachments A-C (c/s) (jl) [Edit date 05/10/02] [1:96cv2882]

5/10/02 344 REPLY MEMORANDUM by Giant Food, Inc. in support of their [330-1] motion in Limine to exclude evidence related to plaintiff's request for

punitive damages (c/s) (jl) [1:96cv2882]

5/10/02	345	REPLY MEMORANDUM by Giant Food, Inc. in support of their [329-1] motion in Limine to exclude evidence related to previously decided issues, including specifically certain evidence identified in plaintiff's proposed pretrial order and Attachments A-B (c/s) (jl) [1:96cv2882]
5/10/02	346	RESPONSE by Giant Food, Inc. in opposition, to [339-1] motion in Limine to Exclude Evidence Including Specifically Certain Evidence Identified in the proposed Pretrial Order by Gregory Carson (c/s) (jl) [1:96cv2882]
5/13/02	347	ORDER DISMISSING Case with each party to bear its own costs unless otherwise agreed without prejudice to the right of a party to move for good cause within 30 days to reopen this action if settlement is not consummated. (signed by Judge J. F. Motz 5/13/02) (c/i 5/13/02) (MICROFILMED 5/13/02) (sf) [1:96cv2882]
5/13/02	--	Case closed (sf) [1:96cv2882]
5/24/02	248	NOTICE OF DISMISSAL AND ORDER, that all claims be dismissed with prejudice and costs shall be

adjusted between the parties in accordance with their agreement. (signed by Judge J. F. Motz 5/22/02) (c/i & microfilmed 5/24/02) (sf)

No. 02-1310
CA-96-2882-JFM
CA-02-537-JFM
CA-02-538-JFM
CA-02-539-JFM
CA-02-540-JFM
CA-02-541-JFM
CA-02-542-JFM
CA-02-543-JFM
CA-02-544-JFM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILBERT SKIPPER, JR.; MELVYN CONNORS; WILLIAM INGRAM; DAVID NEWMAN; ANTHONY BLOCKER; MAURICE MATHEWS; W. KIRB QUALLS, JR.; JOHN W. DALLAS, JR.; DAVID JONES
Plaintiffs - Appellants

and

GREGORY CARSON; JERRY MUNGRO
Plaintiffs

v.

GIANT FOOD INCORPORATED; PETER MANOS, in his official capacity; SAMUEL THURSTON, in his official capacity; MARIA MYERS, in her official capacity; ROBERT HAYWOOD, in his official capacity; DEBORAH LILLY, in her official capacity; TOM MAYNARD, in his official capacity; CHRIS BALLADEMAS, in his official. capacity

Defendants - Appellees

And

UNITED FOOD & COMMERCIAL
WORKERS UNION, Local 400
Party in Interest

Filed May 28, 2002

ORDER

Appellants have filed a motion for stay appeal. Appellees have filed opositions to the motion. Appellants have filed replies.

The Court denies the motion.

For the Court,
/s/
Patricia S. Connor
CLERK